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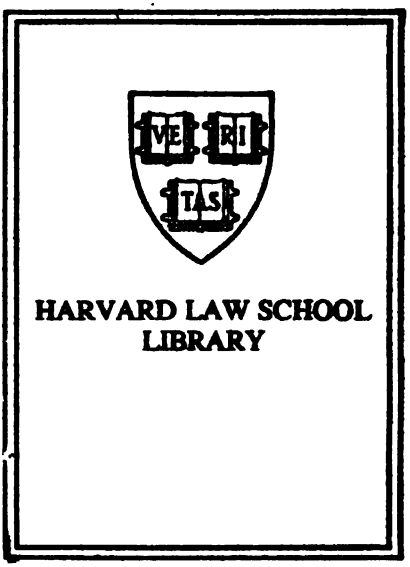

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REPORT OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI

AT THE

MARCH TERM, 1907.

VOL. 90.

REPORTED BY
T. A. McWILLIE.

CHICAGO
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1908

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DURING THE TIME OF THESE REPORTS.

HON. ALBERT H. WHITFIELD, *Chief Justice,*
HON. SOLOMON S. CALHOON, . .
HON. ROBERT B. MAYES, ...
} JUDGES.

ROBERT V. FLETCHER, ... *Attorney-General.*
GEORGE BUTLER, . . . *Assistant Attorney-General.*
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Second District,	Hon. William H. Hardy.
Third District,	Hon. William A. Roane.
Fourth District,	Hon. Sidney M. Smith.
Fifth District,	Hon. Joseph T. Dunn.[1]
Sixth District,	Hon. Moyse H. Wilkinson.
Seventh District,	Hon. Wiley H. Potter.
Eighth District,	Hon. James R. Byrd.
Ninth District	Hon. John N. Bush.
Tenth District,	Hon. Robert F. Cochran.[2]
Eleventh District,	Hon. Samuel C. Cook.
Twelfth District,	Hon. William H. Cook.
Thirteenth District,	Hon. Robert L. Bullard.

[1] Judge Dunn's term will expire Sept. 22, 1908; Hon. George A. McLean was appointed, March 10, 1908, to succeed him.

[2] Judge Cochran's term will expire Aug. 3, 1908; Hon. Jno. L. Buckley was appointed February 26, 1908, to succeed him.

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First District,	Hon. John Quitman Robbins.
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Fourth District,	Hon. J. S. Hicks.
Fifth District,	Hon. G. Garland Lyell.
Sixth District,	Hon. James F. McCool.
Seventh District,	Hon. Percy Bell.[1]
Eighth District,	Hon. Thaddeus A. Wood.

[1] Chancellor Bell resigned March 21, 1908, to take effect May 1, 1908, and Hon. M. E. Denton was appointed to succeed him.

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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT OF MISSISSIPPI,

AT THE

MARCH TERM, 1907.

CITY OF VICKSBURG *v.* MARGARET RICHARDSON.

[42 South., 234.]

MUNICIPALITIES. *Sewerage. Nuisances.*

A city is liable for damages if it fail, after notice, to prevent private sewage being emptied into the gutters along the sides of its streets whereby offal is carried to and collected on a vacant lot, creating a nuisance and rendering a near-by dwelling house uninhabitable.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

Mrs. Richardson, the appellee, was plaintiff in the court below; the City of Vicksburg, the appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was for damage to plaintiff's property on which she resided, on the ground that it had depreciated in value by reason of the discharge, from the gutters constructed by the city for the purpose of carrying off surface or drainage water, of sewage matter from the residences of adjacent property owners,

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Opinion of the court.

emptied into these surface gutters without authority, and that the odor from this matter, deposited near plaintiff's residence at the foot of a hill, became so offensive as to render the premises untenantable, and that the city by permitting and sanctioning this unlawful use of its gutters, over the protest of the plaintiff, became responsible for the nuisance committed and liable for damages. The city contended that since the purchase of the property by the plaintiff no connection of a private sewer had been made with its gutters, that the water which flowed from the gutters emptied in exactly the same place it would have flowed naturally had the gutters not been constructed, that the city had by no affirmative official act permitted any person to discharge objectionable matter into its gutters, and that the city was without authority to protect plaintiff in the premises; that, if any objectionable matter was discharged into its gutters, it was done by persons unknown to the city officials, and came from sources unascertainable. The court instructed peremptorily for plaintiff, and the jury assessed her damages at $500.

Anderson & Voller, for appellant.

Hudson & Fox, for appellee.

[The Reporter has been unable to find the briefs of counsel in this case; they were lost or withdrawn from the record before it came to his hands.]

CALHOON, J., delivered the opinion of the court.

Before the construction of gutters the offal of residences, it seems, was either received by private sinks in the ground for that purpose, or thrown on the lots and dried by the winds and desiccated by the sun, or pursued its descent by gravitation on the several lots on the lines of least resistance, so as not to be a nuisance. The city, as it had the right to do, constructed gutters along the sidewalks to collect and carry off the surface

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Statement of the case.

water, and these ended at and emptied on a vacant lot adjoining the residence of appellee; both being at the bottom of a sharp declivity. This is not complained of. But residents along the line of the gutter made connection with them for their sinks and water-closets, so that the vacant lot of ultimate deposit emitted such a stench that appellee could not reside on her property or occupy her home in the summer time, and the nuisance depreciated the value of her property. The city officers were repeatedly notified of this, but took no steps to remedy the evil. If the city had regular sewerage, it could not, without liability, so debouch its contents, and it cannot permit connection of private sewerage with its gutters to effect the same injury. *Demby* v. *City of Kingston,* 133 N. Y., 538, 30 N. E., 1148; *City of Zanesville* v. *Fannan,* 53 Ohio St., 605, 42 N. E., 703, 53 Am. St. Rep., 664; Am. Dig. (Cent. Ed.), vol. 36, col. 2603; 29 Am. St. Rep., 741—all cited in the brief of counsel. A municipality cannot avoid its ministerial duty to prevent befoulment of its own gutters after notice of the nuisance so created.

Affirmed.

ERNEST R. LOCKE ET AL. *v.* FRIEDMAN KEILER ET AL.

[43 South., 673.]

JUDICIAL SALE. *Setting aside. Fraud. Evidence.*

A judicial sale will not be vacated on the charge that the purchaser fraudulently induced prospective purchasers not to bid against him for the property in the absence of clear, convincing and satisfactory evidence of the fraud.

FROM the chancery court of Leflore county.

HON. CAREY C. MOODEY, Chancellor.

Locke and others, the appellants, were complainants in the court below; Keiler and others, the appellees, were defendants

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Opinion of the court.

there. From a decree partly in complainants' favor the defendants appealed to the supreme court and the complainants prosecuted a cross-appeal.

The sole question decided in the case turned upon an enquiry whether the judicial sale of the property in controversy made in November, 1886, was invalid by reason of the purchaser having fraudulently induced prospective bidders not to bid against him at the sale.

Irwin & Mounger, for appellants.

Green & Green, McClurg & Gardner, and *L. P. Yerger*, for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

We have been at the pains of careful and repeated examination of the facts in respect to the sale in November, 1886, as, indeed, of the whole record. When the chancellor was asked to set aside that sale, the question presented to him for solution was this: Does the evidence show clearly and convincingly that the corrupt agreement was made, and that the land was grossly sacrificed in consequence of that agreement? Or, to put it differently, is the court warranted, by testimony clear, convincing, and satisfactory, that the fraud alleged has been established? It would be idle to attempt to set out a full review of all the facts in this voluminous record. Suffice it to say that we have examined them, not once, but repeatedly. We have weighed them in every aspect in which the subject can be viewed, under the well-settled rule that fraud must not only be proven clearly and convincingly, and we are driven to the conclusion that the evidence in the record, taken as a whole, fails to satisfy clearly and convincingly [illegible]

Statement of the case.

but when this evidence is put in the balances, and weighed against the countervailing evidence, and the whole case made by the facts is tested by the rule we have stated, we cannot fail to hold that the chancellor erred, and manifestly erred, in setting aside the sale of November 1, 1886. Fraud is not a thing to be lightly charged, and most emphatically is not a thing to be lightly established. The stigma which follows from it is one not to be placed upon parties, unless the evidence measures squarely up to the requirements of the rule of satisfying a court clearly and convincingly of the truth of the fraud. Viewed as an entirety, the testimony in this case does not meet this rule, especially when it is considered that this sale was not challenged until some fifteen years after it had been made, and that several of the parties participating in the sale are dead, and, of course, not here to give their version of the matter.

Wherefore the action of the chancellor in setting aside the sale of November 1, 1886, is reversed and the bill dismissed.

LINCOLN COUNTY *v.* CITY OF BROOKHAVEN.

[41 South., 449.]

MUNICIPALITIES. *Code* 1892, § 2939. *Ib.*, § 3931. *Laws* 1897, *ch.* 16, *p.* 17, *sec.* 16. *Road taxes. County road fund. Rights of city.*

A municipality governed by the Code chapter entitled "Municipalities," being a separate road district, Code 1892, § 2939, is entitled to one-half of a road tax levied, under Code 1892, § 3931, laws 1897, ch. 16, p. 17, sec. 16, by the county and collected on property within its corporate limits.

FROM the chancery court of Lincoln county.

HON. ROBERT B. MAYES, Chancellor.

The City of Brookhaven, the appellee, was the complainant in the court below; Lincoln county, the appellant, was defendant there. The court below entertained jurisdiction by con-

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sent of the parties and rendered a final decree in complainant's favor from which the defendant appealed to the supreme court.

Constitution 1890, § 147, providing that a judgment or decree of a circuit or chancery court rendered in a civil cause should not be reversed because of any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction, precluded enquiry on that subject in the supreme court.

Lincoln county began to work its public roads by contract in 1897, under laws 1897, ch. 16, p. 17, having adopted the statute as provided in its 15th section, by ordinance of the board of supervisors. The county levied and collected a one mill tax on all the taxable property in the county for the purpose of working its public roads.

The City of Brookhaven, a municipal corporation of said county, governed by the Code chapter entitled "Municipalities," had jurisdiction and control of its streets and worked them, but did not levy a special municipal tax for the purpose; it met the expenses of working its streets with a commutation tax and moneys coming into its treasury from several other sources.

The county contended that since no special tax was levied by the municipality for street purposes, the city was not entitled to one-half of the tax collected by the county for road purposes on property within the city.

Brennan & Hannah, for appellants.

The statute construed in the case of *McComb City* v. *Pike County,* 86 Miss., 647, s.c., 38 So. Rep., 721, is identical with sec. 3931 of the Annotated Code except the surplusage of the words "or worked by municipal authority" after the words "are worked at the expense of the municipal treasury." Our view is that the words "or worked by municipal authority" is explanatory of the words "worked at the expense of the municipal treasury" and that the decision above cited settles this question,

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and every point therein. While it is true that the city of Brookhaven constituted a separate road district and that the board of supervisors exercised no control over the working of its streets, yet on the other hand the City of Brookhaven provided no means with which to work its streets and consequently was without power to exercise any control over them, other than uncommuted labor and the money collected from the commutation tax of its citizens. The board of supervisors of any county in Mississippi does not exercise control of the working of the public streets of the several municipalities therein situate, and certainly we think that the view advanced by this court, in the case of *McComb City* v. *Pike County,* above cited, that the ad valorem tax was only to be divided with municipalities which worked its streets with money collected by taxation and no other class is decisive. This court held that commutation money is in no proper sense a tax at all, but is as its name implies, merely the commuted labor of the citizen. And as stated above it is not shown anywhere that the City of Brookhaven ever levied a tax for the purpose of working its streets, and we most respectfully submit that the court below erred in rendering the decree above referred to and that the same should be reversed.

A. C. & J. W. McNair, on same side.

The vital charges of the bill of complaint for the appellee's recovery are, that during the fiscal years 1903, 1904, 1905, the municipality of Brookhaven worked its streets "at the expense of the municipal treasury, or that the streets were worked by the municipal authority." Each of these charges of the bill are denied by the answer, and the burden of proof is on the appellee to show by the testimony the truth of one or both of the charges. We submit that there is a complete failure to sustain the allegations. You will search the record in vain for testimony to show that the streets were worked at all during the years mentioned. The mayor testifies in a general vague

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way about the procedure and manipulation of funds and the borrowing of funds, etc., but he nowhere states that the streets were worked during these years, as required by sec. 3931 of the Code of 1892 so as to entitle the appellee to recover.

Thomas Brady, Jr., on same side.

The appellee contends that its streets were and are "worked at the expense of the municipal treasury or worked by municipal authority," and therefore it is entitled to one-half the taxes collected on property within its corporate limits under the one mill levy made by appellant to secure a road bed for the years 1903, 1904 and 1905. Appellant contends that appellee is not entitled to one-half the taxes collected on property within its corporate limits under the one mill levy which it made for the years 1903, 1904 and 1905 because appellee's streets were and "are not worked at the expense of the municipal treasury or worked by municipal authority."

A street tax must be levied and collected and paid into the municipal treasury to be applied to the working of its streets before it can be said that the streets of a municipality are worked at the expense of its public treasury or under its authority. See *McComb City* v. *Pike County,* 86 Miss., 647, s.c., 38 So. Rep., 721.

The appellee has never levied a street tax, has never collected a street tax, does not work its streets at the expense of the municipal treasury, and therefore does not work them by municipal authority and hence cannot recover in this case.

Green & Green, for appellee.

1. The finding of fact by the chancellor is right. It will not be disturbed unless clearly wrong.

2. Up to the years 1903–4, the county of Lincoln recognized the right of Brookhaven to have one-half of this ad valorem tax, thus, by the acts of the parties for ten years, there was a

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practical interpretation of the statutes involved, which is not now for the first time to be rejected.

Where a statute has received a practical construction for a long time it will not be overturned except for the most cogent reasons. 26 Am. & Eng. Ency. L. (2d ed.), 633.

3. It would seem that the opinion of Special Judge Cox, in *McComb City* v. *Pike County,* 86 Miss., 647, s.c., 38 So. Rep., 721, interpreting ch. 119, Laws of 1900, led to the discovery that this settled rule of construction acted on by the parties for years could be overturned.

If *McComb* v. *Pike County, supra,* was sound, it could have no application here, for to make ch. 119, Laws of 1900, apply, it is expressly enacted by sec. 11, that it must be adopted by the county. Lincoln county did not adopt ch. 119, Laws of 1900, and, hence, there is not drawn in question the difficulties of that act which troubled the court.

The statutes applicable to Lincoln county are Code of 1892, § 3931 and ch. 16, Laws of 1897, secs. 1, 12 and 14, and as to Brookhaven the municipal chapter, Code 1892, § 2939.

With all respect the difficulties Judge Cox saw in ch. 119 in *McComb City* v. *Pike County,* are not real. Section 6 of that act provided that there should be eight days' special work done on the public roads under the contractor, but that this work might be commuted by the payment of $3, special commutation tax for road purposes, and that this commutation tax shall be expended in the district, or incorporated village, town or city from which it was collected; that the tax collected from the residents of municipalities should be paid over to the proper authorities to be expended by the municipality for road purposes. Thus the roads, country and town of the entire county are subjected to this service, or in lieu commutation can be paid.

P. Z. Jones, on same side.

In arriving at a proper conclusion in this cause it is necessary to ascertain the meaning of the phrase "or worked by

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municipal authority" found in sec. 3931 of the Code of 1892. The City of Brookhaven is operating under the provisions of the Code, ch. 93, on the subject of "Municipalities" and for the years 1903, 1904 and 1905 the street fund consisted alone of money paid into the treasury by persons subject to street duty in lieu of labor on the streets and fines imposed on delinquent street hands. But when this fund was exhausted warrants were issued on the general revenue fund of the city to make up any deficit that might exist. No tax was levied by the city on the property within its corporate limits for the purpose of working the streets. The position of the appellee is that even though it should be held that the streets were not worked at the expense of the municipal treasury, that it is still entitled to one-half of the tax levied by the county because of the fact that the streets of the city were worked by "municipal authority." When the code was adopted in 1892, there had been no adjudication by this court on the question of whether the jurisdiction of counties was concurrent with that of the municipalities over the highways within the limits of the municipalities or whether the jurisdiction of the municipalities over the highways within their limits was exclusive. The authorities were divided, the courts of some jurisdictions holding that the counties had concurrent jurisdiction with the municipalities over the highways within municipal limits, others holding that the jurisdiction of the municipalities was exclusive. The legislature being aware no doubt of this uncertainty as to the question above mentioned and having in mind the fact that in some instances the county authorities might continue to exercise control and authority over the streets and highways within the corporate limits of said villages and towns thought that it would be right and proper in such case that the county should not be called upon to divide its road taxes with this class of municipalities. That is to say, that class of municipalities which permitted the counties to work, and keep up the streets and highways within their limits. There would

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certainly be no justice or equity in compelling any county to divide its road fund with a municipality which required the county to keep up its streets. When the county keeps up the streets of a town, the county ought to be allowed to retain the necessary funds for this purpose. That this uncertainty with reference to the jurisdiction of counties and municipalities existed at the time of the adoption of the law in question is emphasized by the fact that afterwards, in the year 1895, a case came to this court where a county road overseer was indicted for failing to work that portion of a public highway within the limits of a certain town. *Blocker* v. *State,* 72 Miss., 720. WHITFIELD, Justice, speaking for the court in an elaborate and well-considered opinion in which many authorities are reviewed and discussed, held that the jurisdiction of the municipality over its highways was absolute and exclusive. The indictment was quashed and the appellant discharged. See along this same line Elliott on Roads and Streets (2d ed.), secs. 415, 416, 417 and 4531 Dillon on Mun. Corp. (4th ed.), secs. 676, 679, 762.

In view of the foregoing authorities and the state of the law at the time of the adoption of the section of the law in question we are forced to the opinion that the legislature meant something by the use of the words "or worked by municipal authority" found in the statute under review. It is a well-settled rule of construction that each and every part of a statute shall be construed so as to give force and effect to the entire statute. A construction which would eliminate any part of a statute is not favored. If it is susceptible of two constructions one of which would abrogate a part of the statute and the other give effect to all of it, the latter construction is to be adopted. The construction contended for by the appellant would eliminate the phrase in question.

Argued orally by *Marcellus Green,* for appellee.

CALHOON, J., delivered the opinion of the court.

The case of *McComb City* v. *Pike County,* 86 Miss., 647, 38

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South. 721,* has no relevancy to this. This court, on the record before it in this proceeding, is under no necessity, as it was in that case, to interpret the obscure meaning of secs. 6, 7, ch. 119, pp. 154, 155, Laws 1900. That statute is not concerned with the present litigation, because sec. 11 (page 156) of it provides that it is not in force until adopted by the board of supervisors of the county desiring it, and this has not been done in Lincoln county. The statutes controlling in this record are Code 1892, §§ 2939, 3931, Laws 1897, ch. 16, p. 17, secs. 1–12, 14. Under Code 1892, § 2939, Brookhaven is a "separate road district." Section 3931, Code, has this clause:—"The taxes so collected on property within a municipality, the streets of which are worked at the expense of the municipal treasury or worked by municipal authority, shall be equally divided between the county road fund and the municipal street fund." It is perfectly manifest here that the streets of Brookhaven were worked by, and exclusively by, the municipal authority, and it was therefore entitled to the division of the funds it asks.

Affirmed.

* Since overruled. *McComb City & Pike Company*, 45 South 871.

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Statement of the case.

WILLIAM H. BUSBY *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[43 South., 1.]

PRINCIPAL AND AGENT. *Unauthorized act. Scope of agency. Duty to ascertain. Contracts.*

Persons who deal with the agent of another must learn the scope of his authority or act at their own peril.

FROM the circuit court of Wilkinson county.

HON. MOYSE H. WILKINSON, Judge.

Busby, the appellant, was the plaintiff in the court below, and the railroad company, the appellee, was defendant there. From a judgment in defendant's favor predicated of a peremptory instruction, the plaintiff appealed to the supreme court.

Busby sued the defendant railroad company for $1,990, damages sustained by him, as averred, from the failure of the company to construct a switch or spur track from its main line of railroad to his sawmill, under an alleged contract entered into between him and the defendant's roadmaster and traveling freight agent, by which, according to the testimony of plaintiff, it was agreed that upon his doing the grading and furnishing the cross-ties, the railroad company would lay the track. Plaintiff offered evidence tending to show negotiations with Downs, defendant's roadmaster, and O'Conner, defendant's traveling freight agent, by which and in which defendant company agreed to construct the switch track, the cost of the grading to be borne and the cross-ties to be furnished by plaintiff, and a contract to this effect was made. Subsequently the defendant company's traveling freight agent, O'Conner, had the necessary surveys made, and gave to plaintiff a blue print of the plans and specifications of the switch track, and plaintiff made the necessary grading according thereto and furnished the cross-

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ties at considerable expense; that defendant company refused to comply with the contract, whereby plaintiff suffered the expenses of the grading, the purchase price of ties, and lost heavily by reason of his inability to transport lumber from his mill to distant purchasers.

The defendant company defended on the ground that its agents had not entered into any contract with plaintiff to construct the switch track, and that the officials named by plaintiff as having made such contract were without authority in the premises. It further offered evidence showing that by the company's course of business and rules, whenever application was made by any person for a switch track "it was required to be made in writing to the superintendent of the road, whereupon the roadmaster would be sent to inspect and determine its expediency and cost, after which a blue print would be made of the proposed switch track, and the application and report and the blue print and all other specifications throwing light upon the subject would be submitted to the traffic department of the company for determination of the probable revenue to be derived by the company from the switch, and thereafter the matter would be laid before the second vice-president of the company for final action and approval." It was further shown in evidence that the traffic department disapproved the laying of the switch track, and so notified plaintiff.

Clem V. Ratcliff, for appellant.

The damage to the plaintiff was not controverted by the railroad company, but practically admitted. The company's defense was, first, that its agents made no contract, and, second, if such contract was made with plaintiff, that the company's agents who made it were acting beyond their authority. Yet, each of the two witnesses for the defendant company, to-wit, the roadmaster and the general freight agent, admitted himself to be an authorized general agent for the company in his line of duty, and each of the two admitted that a part of his

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Brief for appellee.

duty led him to consider and pass upon the construction of this spur track, and that he was consulted about the matter. It is not the province of the judge to pass upon the credibility of the evidence. The acts and conduct of the two witnesses for the defendant made them the authorized agents of the defendant.

An agency may be created either by express words, or by the acts of the principal and agent; or it may be implied or inferred from circumstances and conduct of the parties. *Geylin* v. *DeVelleroi,* 2 Houst., 311. To the same effect, see *Fay* v. *Richmond,* 43 Vt., 25; 1 Am. & Eng. Ency. Law, 410; *Dye* v. *Virginia Midland R. R. Co.,* 20 D. C., 63; *Florida, etc., R. R. Co.* v. *Branedoe,* 81 Ga., 175.

The defendant is estopped to deny the agents' authority under the proof in this case. *Baker* v. *Kansas City, etc., R. R. Co.,* 3 S. W., 486. The principal must disaffirm within a reasonable time, or he ratifies the acts of his agents. *Weiss* v. *Morgan,* 51 Miss., 21; *Cotton* v. *Hiller,* 52 Miss., 7; *Meyer* v. *Baldwin,* 52 Miss., 263.

It was certainly a question of fact for the jury, whether the conduct of the admitted agents of the company, dealing with the plaintiff as they did, bound the defendant.

Mayes & Longstreet, for appellee.

The evidence shows, without dispute, that neither Downs, the roadmaster, nor O'Conner, the traveling freight agent, had authority of any kind to contract for the switch track. Moreover, both denied the making of such contract.

If Busby, in dealing with the traveling freight agent, knew he was the agent of the company, he dealt with him at his peril; and the question of any rights acquired by him must be determined by the ultimate demonstration of the power and authority of the agent. *Brown* v. *Johnson,* 12 Smedes & M., 398; *Dozier* v. *Freeman,* 47 Miss., 660; *Kinnare* v. *Gregory,* 55 Miss., 612; *Railroad Company* v. *Scott,* 64 Miss., 713.

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Statement of the case.

CALHOON, J., delivered the opinion of the court.

It is abundantly shown by direct evidence that neither Downs, the roadmaster, nor O'Conner, the traveling freight agent, had any authority to contract for the switch track. So, if either tried to make such contract, which is denied, no power existed; and there is no evidence, direct or indirect, or of custom or precedent, that there was such power or authority, and those who deal with an agent, or supposed agent, must learn the scope of the agency, as to which they act at their peril.

Affirmed.

STANDARD CONSTRUCTION COMPANY *v.* BRANTLEY GRANITE COMPANY.

[43 South., 300.]

CONTRACTS. *Performance. Acceptance by architect. Fraud. Pleading. Evidence.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising architect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and.

(*b*) Evidence that the architect acted fraudulently, or made such mistake, is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

The Granite Company, the appellee, a corporation, was the plaintiff in the court below, and the Construction Company, the appellant, a corporation, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The appellant being under contract with the United States

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Statement of the case.

Government for the erection of a stone post office and custom house building in Biloxi, entered into a subcontract in writing with the appellee, whereby, for a stipulated price, the Granite Company was to provide all material and perform all of the granite work for the building, it being stipulated that the granite should be delivered by the Granite Company to the Construction Company on the cars at the railroad depot in Biloxi, and that the granite should be satisfactory to the supervising architect of the United States Treasury Department. In good faith and in fulfilment of its part of the contract the Granite Company cut a large quantity of granite at its quarry in Georgia to conform to the proportions required, and shipped the same to Biloxi to the Construction Company. Subsequently the architect rejected the stone on the ground that it was not satisfactory for the purposes needed. The Construction Company, on being sued by the Granite Company for the price of the stone, set up as a defense the rejection of the stone by the architect, and demanded judgment against the Granite Company for a sum in excess of that claimed by it, alleging that by reason of the failure of the Granite Company to furnish proper stone, satisfactory to the architect, it had been put to much loss. There was testimony offered by the Granite Company to the effect that the stone furnished and delivered to the appellant complied fully with the requirements of the contract, and that if the stone had become damaged the same occurred after it had been received by the appellant. On the other hand it was claimed that no damage had been sustained by the stone after its reception. The supervising architect, one Dupros, testified that the sole reason why the stone had been rejected was because it did not comply with the specifications and samples in the hands of the United States Treasury Department, as stipulated in the contract between appellant and appellee. The jury returned a verdict for the Granite Company for the sum demanded in the declaration, $1,975, and the court below gave judgment accordingly.

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Brief for appellant.

Harper & Harper, for the appellant.

The contract between the appellant and the appellee stipulated that the granite to be used in the construction of the building must be satisfactory to the architect, and that all not so satisfactory must be removed. Acceptance of the granite by the architect was accordingly a condition precedent to any recovery by the appellee, yet in spite of the proof that the architect declined to accept the granite, the lower court refused the peremptory instruction asked by the defendant below, the appellant here, and permitted the case to go to the jury on several different instructions asked by the appellee, which were unsupported by the evidence.

There was no ambiguity in the contract. It gave to the architect the determination of what the plans and specifications were between the parties. And it left to the architect the determining whether the granite came up to the plans and specifications. A power was thus delegated by the appellant and appellee to the architect, and delegated, not by virtue of law nor yet by virtue of his position as a representative of the United States Government, but simply because the appellant and appellee solemnly consented to such end in writing. And under the terms of the contract the architect's decision was to be final. Accordingly the actions of the architect cannot be subject to the revisory power or authority of any court, unless it be for fraud or gross mistake. And no question of fraud or mistake was raised by the evidence. It would do violence to the language of the contract to attempt to change its specifications that the architect should determine whether the granite was satisfactory. We distinctly reiterate that the evidence—and in fact the pleadings also—failed to allege any fraud or dishonest exercise of judgment upon the part of the disinterested architect.

In *Kihlberg* v. *United States,* 97 U. S., 398, 24 Law Ed., 1106, Mr. Justice HARLAN said: "The contract which is the foundation of this action provides that transportation shall be

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paid in all cases according to the distance from the place of departure to that of delivery. But no specific rule is prescribed for the ascertainment of distances. The contract is silent as to whether they shall be estimated on an air line or by the route usually traveled by contractors in conveying government stores, or by the road over which troops ordinarily marched when going from one post to another. The parties however concurred in designating a particular person, the chief quarter-master of the District of New Mexico, with power not simply to ascertain but to *fix* the distances which should govern in the settlement of the contractor's account for transportation. The written order of General Easton to the depot quarter-master at Fort Leavenworth was an exertion of that power. He discharged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the chief quarter-master, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action, therefore, cannot be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If the contract had not provided distinctly and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might constantly have arisen between the contractor and the government, resulting in vex-

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atious and expensive, and to the contractor, oftentimes ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained by the chief quarter-master, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise honest judgment in the premises, his action in the premises is conclusive upon the appellant as well as upon the government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

This principle is reiterated in *Sweeney* v. *United States,* 109 U. S., 618, 3 Sup. Ct., 344, 27 L. Ed., 1053, wherein Mr. Justice WAITE stated: "This judgment is affirmed on the authority of *Kihlberg* v. *United States,* 97 U. S., 398. It was provided in the contract that payment for the wall was not to be made until some officer of the army, civil engineer, or other agent, to be designated by the United States, had certified, after inspection, that it was in all respects as contracted for. The officer of the army, designated under this authority, expressly refused to give the necessary certificate for the alleged reason that neither the material nor the workmanship were such as the contract required. The court below found that there was neither fraud nor such gross mistake as would necessarily imply bad faith, nor any failure to exercise an honest judgment on the part of the officer in making his inspections. The appellant was not notified of the defective character of the material and that it would not be accepted, before he put it into the wall; and after he had completed his work, the wall which he constructed was taken down by order of the quarter-master general and a new one made of other material built in its place."

In *United States* v. *Gleason,* 175 U. S., 590, 20 Sup. Ct., 233, 44 L. Ed., 284, the United States Supreme Court again sanctioned the rule laid down in the *Kihlberg case, supra,* and

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stated that "if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him." And this decision cites *Dermott* v. *Jones,* 2 Wall., 1, 17 L. Ed., 762; *Cutter* v. *Powell,* 6 T. R., 320; 2 Smith, Leading Cases, 1; *Martinsburg* v. *March,* 114 U. S., 549, 5 Sup. Ct., 1035, 29 L. Ed., 255; and *Chicago, etc.,* v. *Price,* 138 U. S., 185, 11 Sup. Ct., 290, 34 L. Ed., 917.

Now, with the above authorities before us, note the undisputed testimony of Mr. Dupros, the architect: "Q. What is your occupation or employment? A. I am superintendent of public buildings of the United States Treasury Department. Q. How have you been engaged for the past year? A. I have been superintending the public building at Biloxi for the government. I am there in the interest of the people to carry out the plans and specifications according to sample furnished the Treasury Department. Q. Did you ever examine the granite which this suit is about, and did you accept or reject it? A. I examined the granite, and I rejected it. Q. Why did you reject it? A. Because it did not come up to the plans and specifications and samples furnished to the United States Treasury, and because it was not up to the contract which existed between the United States government and the Standard Construction Company."

As this testimony was undisputed, and as the law is as above stated, the judgment of the lower court should be reversed and the cause remanded.

L. H. Doty, for appellee.

The testimony of Mr. Dupros, the architect and superintendent of the building, upon which so much stress is laid by learned counsel for appellant, is merely the testimony of a bigot who has suddenly been placed in authority. The testi-

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mony of Mr. Dupros is wholly irrelevant to the issue between appellant and appellee. The evidence shows that there was no examination and no rejection of the granite until more than five months after its delivery in the City of Biloxi, to the Standard Construction Company. This delivery was not to the site of the building in Biloxi, but merely f. o. b., Biloxi, that is, merely delivered on the car at the freight depot at Biloxi. It had to be, and was, moved about a mile by the Standard Construction Company, and was by this company left near the building, uncrated, where workmen and others were constantly going to and fro. Hence, the granite was delivered according to the contract, plans and specifications, and this court will affirm the judgment of the lower court.

The case upon which learned counsel for appellant rely, *Kihlberg* v. *United States,* 97 U. S., 398, is not applicable to this case at all, for in the case cited there was a plain contract between Kihlberg and the United States, wherein the stipulations were clear and concise, and Kihlberg clearly breached the contract. The other case cited by opposing counsel, *Sweeney* v. *United States,* 109 U. S., 618, was one where Sweeney contracted with the United States Government, and, under the contract, submitted certain brick to the Government's architect, which brick were condemned. Sweeney afterward built the wall contracted for, out of the condemned brick, and demanded his money. The court rightly held that he could not recover.

I submit that the contention of counsel for the appellant that the contract between appellant and appellee, as regards the matter here in issue, is not subject to the revisory power of our courts, is without merit.

Frank Johnston, on the same side.

This was a case peculiarly appropriate for a jury, and was decided by the jury according to the decided preponderance of the evidence. Many different witnesses, among them experts, testified positively that the stone was up to the sample in grade;

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that it was cut according to the specifications, and that the damage, if any, was done to the stone by chipping, and was so minute as to have been trifling. It is undisputed from the evidence that if there was any damage to the granite it occurred after the granite reached Biloxi, and after the appellant had taken charge of the same. On complaint from appellant the appellee sent an expert stone cutter all the way from the quarry to Biloxi to remedy any defects which, by oversight might possibly have existed in the stone when it was shipped from the quarry. This witness testified that "there were some pencil marks on some of the stones indicating a little roughness," but he further said that the defects were trivial with the exception of some chipped corners of different pieces of granite which had evidently been lying for some time, uncrated, and in the path of workmen and other persons, and liable to damage therefrom.

Against this evidence are the statements of merely two witnesses, the representative of the appellant, and the architect, Mr. Dupros. Mr. Dupros testified, without explanation and without any particulars, that the stone furnished by the appellee to appellant for use in the building, had been inspected by him and that it did not come up to specifications and samples, hence was not according to contract.

The preponderance of the evidence was clearly with the appellee, the plaintiff in the court below. But even if the evidence were sharply conflicting, this court would not disturb the verdict of the jury. For the court to disturb a jury verdict, there must be a clear preponderance of evidence against the verdict. *Brown* v. *Forbes,* 8 Smed. & M., 498; *Sims* v. *McIntyre,* 8 Smed. & M., 324. Where the evidence is conflicting, one part sustaining the verdict, and the other against it, a new trial will not be granted unless the verdict is clearly wrong. *Garland* v. *Stewart,* 31 Miss., 314; *Gay* v. *Lemly,* 32 Miss., 309. When the mind cannot repose with entire confidence upon a conclusion in favor of either party, the verdict

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will not be disturbed. *Watson* v. *Dickens,* 12 Smed. & M., 608; *Woods* v. *Gibbs,* 35 Miss., 559.

According to the contract, it is true the stone was to be satisfactory to the government architect, Dupros, but this did not mean that stone which was similar to the sample and cut in the requisite proportions of the contract, could be capriciously or arbitrarily rejected by the architect so as to defeat the rights of the appellee. All contracts must have a reasonable interpretation.

Argued orally by *Frank Johnston,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The contract in this case expressly provides in article four that "the contractor shall, within twenty-four hours after receiving written notice from the architect or owner, proceed to remove from the grounds or buildings all material condemned by him, whether worked or unworked, and to take down all portions of the granite which the architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications." By article six it is likewise expressly provided that "all granite must be equal to the samples which the contractor has submitted to the owner and must be satisfactory to the architect." Article nine expressly provides that "payment will be made in full within thirty days after the granite has been delivered and accepted by the architect." These are the plain and unequivocal provisions of this contract. There is no ambiguity whatever about them. The stipulation is that the granite must be satisfactory to the architect and must be accepted by the architect; and it is expressly provided that all not so satisfactory shall be removed from the grounds and building, and actually taken down, although the granite may have been put into the building. The parties were entirely competent to make such contract if they so desired. There is no conflict whatever in the testimony as to the fact that the granite was not satisfactory to the architect and

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was not accepted by him, but was ordered to be removed from the grounds in accordance with the provisions which we have set out above. There is not a single allegation in the declaration that the architect was guilty of any fraud, or of any such gross mistake as would imply fraud, or of any dishonest exercise of his judgment, and there is not one particle of proof to show any of these things. On this state of case the court should have given a peremptory instruction for the defendant.

The principle has been over and over settled by the supreme court of the United States, some of the best authorities being very carefully collected in the very able brief of the learned counsel for appellant. The principle was laid down by Judge HARLAN in *Kihlberg* v. *United States,* 97 U. S., 398, 24 L. Ed., 1106, as being this: That in such case, wherever the parties by their contract have expressly delegated to a tribunal or persons the determination of the question whether the material is of the required quality, the determination of such persons is final, "in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment in the premises." This principle is reiterated in *Sweeney* v. *United States,* 109 U. S. 618, 3 Sup. Ct., 344, 27 L. Ed., 1053, in which case it is further stated that the decision of such person or tribunal is not subject to the revisory powers of the courts, in the absence of fraud as stated above. In the case of *United States* v. *Gleason,* 175 U. S., 590, 20 Sup. Ct., 233, 44 L. Ed., 284, the court said: "While we are to determine the legal import of this provision according to its own terms, it may be well to briefly recall well-settled rules in this branch of the law. One is that if a party by his contract charges himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for dispensation, the rule of law gives none; nor in such circum-

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stances can equity interpose. *Dermott* v. *Jones,* 2 Wall. (U. S.), 1, 17 L. Ed., 762; *Cutter* v. *Powell,* 6 T. R., 320; 2 Smith, Leading Cases, 1. Another rule is that it is competent for parties to a contract of the nature of the present one to make it a term of the contract that the decision of an engineer or other officer that all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or mistake so gross as to necessarily imply fraud, such decision will not be subject to the revisory power of the courts. *Martinsburg* v. *March,* 114 U. S., 549, 5 Sup. Ct., 1035, 29 L. Ed., 255; *Chicago, etc.,* v. *Price,* 138 U. S., 185, 11 Sup. Ct., 290, 34 L. Ed., 917. The fallacy, we think, of the court below, was in assuming that it was competent to go back of the judgment of the engineer and to revise his actions by the court. This, we have seen, could only be done upon allegations and proof of bad faith, or of mistake so gross as to justify an inference of bad faith; but in this case we find neither allegation nor proof. The plaintiffs allege that they were prevented from completing their work by force and violence, and not through any fault of their own, and that the judgment of the engineer in refusing an extension was, therefore, wrongful and unjust. But, as they agreed in the contract, as we have construed it, that the engineer was to decide whether the failure to complete was due to the force of the elements or to their fault, their allegation now is that the determination of the engineer was wrongful and unjust, because he decided the submitted issue against them. Of course, such an allegation is wholly insufficient on which to base an attempt to upset the judgment of the engineer. Without protracting the discussion, our conclusion is that no allegation or finding is shown in this record sufficient to justify the court in setting aside the judgment of the engineer as having been rendered in bad faith or in any dishonest disregard of the rights of the contracting party."

It follows, from these views, that the judgment of the court below is reversed, and the cause remanded.

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Statement of the case.

MEYER-BRIDGES COMPANY v. GEORGE T. BADEAU.

[43 South., 609.]

STATUTE OF FRAUDS. *Code* 1906, § 4775 (*a*). *Promise to answer for debt of another.*

A term in a contract of employment whereby a traveling salesman agreed to bear a percentage of the losses arising from the insolvency of persons to whom he might sell his employer's goods is not a collateral agreement and does not violate the statute of frauds, Code 1906, § 4775 (a), providing that an action shall not be brought whereby to charge a defendant or other party upon any special promise to answer for the debt or default or miscarriage of another person.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

Badeau, the appellee, was plaintiff in the court below; the Meyer-Bridges Company, the appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

Plaintiff sued for $119.92 for commissions on sales made by him as defendants' salesman. Appellant's evidence is that it would owe appellee $118.65, if it were not for losses on sales made by appellee to parties who did not pay their accounts, but became bankrupt or died insolvent. The appellant made cross-demand in the suit for these losses, which exceeded appellee's demand. The evidence was that appellee and Meyer-Bridges Co., a partnership, entered into a written contract for the year 1903 as follows:

"The following agreement, entered into by Meyer-Bridges Co., Louisville, Ky., and G. T. Badeau, Hammond, La.: As compensation for such services we are to allow him hotel and traveling expenses, which are not to exceed $1,200 per annum,

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Statement of the case.

and 50 per cent. of the gross profits made on his sales accepted by us, after deducting the $1,200 for expenses above referred to. He guaranties the gross profits for the year to amount to $4,800. It is also understood and agreed that said G. T. Badeau is to pay 50 per cent. of the losses made by him during the existence of this contract. In addition to the above he is to receive 5 per cent. commission on all brooms, brushes, and mops sold by him for and billed by the Louisville Broom Works. Said compensation to be computed after all freights are deducted. It is understood and agreed that he is to travel such territory as we may designate.

"MEYER-BRIDGES CO."

"Accepted: G. T. BADEAU."

It was shown that appellee continued to act as salesman to March, 1905, and that in 1904 one of the partners died; and the corporation, the Meyer-Bridges Company, was organized and continued the business, taking over the assets and assuming the liabilities, of the partnership. Appellant showed that some of the accounts sold by appellee were not paid, but were losses, on account of bankruptcy and insolvency of debtors. Some of these losses were ascertained before the organization of the corporation. Appellee's evidence is that for the year 1904 and the subsequent years there was a verbal contract which made no provision for a division of losses; otherwise, it was practically the same as the written contract for 1903, with a change in commissions for broom sales. The testimony for appellant is that the verbal contracts for 1904 and 1905 were the same as the written contract for 1903, except that the commissions for broom sales were changed; that the written contract, as changed in the matter of broom sales, was verbally adopted for 1904 and 1905.

On the trial in the circuit court the plaintiff's motion to exclude the evidence on the cross-demand of defendant and for a peremptory instruction for the jury to find for the plaintiff the

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Brief for appellant.

sum of $118.65 was by the court sustained, and peremptory instruction given for the appellee directing a verdict for plaintiff for $118.65.

Quin & Williams, and *F. H. Lotterhoss,* for appellant.

The chief question in this case is whether the stipulation by Badeau as to the losses on customers, with whom he dealt for the appellant, is within the statute of frauds. In other words, should the evidence of losses have been excluded, and the jury instructed peremptorily to find for the appellee? In the solution of this question, we submit, that if Mr. Badeau agreed, for the years 1904 and 1905, to share the losses on sales made by him, such promise was not within the statute of frauds, and was provable by a verbal agreement.

The written contract for 1903, is to the effect, that appellee should be paid fifty per centum of the gross profits, after deducting traveling expenses, and should pay fifty per centum of losses on sales made by him. The appellee testified that for the year 1904, there was a verbal contract, by which he was to receive fifty per centum of gross profits, after deducting traveling expenses, and that this did not include a provision for losses; in fact, that the question of losses was not mentioned, and that he inferred that there had been no losses for 1903. But the testimony of the appellee was controverted by the testimony of several witnesses for appellant, to the effect that the contract between appellant and appellee was by verbal agreement continued for the ensuing year 1904 and on into 1905, the only change being in regard to a commission on brooms, also mentioned by the appellee. With such conflict in the evidence, it was, surely, a question for the jury to determine, whether or not appellee agreed to share the losses for 1904 and 1905.

Appellant's agreement was a part of the original contract under which he was to sell the goods, and was in nowise a collateral agreement. *Timberlake* v. *Thayer,* 76 Miss., 23, So. Rep., 767.

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Appellant and appellee could have agreed verbally, that in consideration of appellant's selling the goods, he should receive one-half of the net profits, and this is practically what they did, except that appellant was to suffer no reduction of the gross profits, save as mentioned in the contract.

It is a generally accepted rule, that community of profits implies a community of losses, and it follows, in a certain sense, that losses are nothing more than a diminution of profits. *Priest* v. *Chouteau,* 12 Mo. App., 252.

Cassedy & Cassedy, for appellee.

It is claimed by appellant that Badeau agreed that he would be responsible for one-half of the losses sustained by the appellant on all sales made by him, and that it sustained losses, which constitute its set-off. We claim that this is an agreement to answer for the debt of another and should be in writing to bind appellee under the statute of frauds. He was the agent of the Meyer-Bridges Company to make sale of the company's wares to customers on a credit, and the debt was due to the company from the customer, and in effect the contract was, "if he does not pay I will," and this is answering for the debt of another. The record will show, that in 1903, there was a written contract, and in 1904 and 1905 there was none in writing, unless it be held that a verbal agreement "to continue the old contract" which was dead by its own terms, constitutes a written contract. We take it that no court would so hold. The same reason which caused the statute to be enacted applies here, because it is a verbal contract to continue in force a former written contract. This would exclude all the evidence as to losses for 1904 and 1905, and there were no losses shown or attempted to be shown under the contract of 1903. The only evidence was that between January 1, 1903, and January 18, 1904, there were two debts of losses, one for $37.11 and the other $81.64. It was not shown when these were contracted or when lost; they might have been contracted and lost between

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January 1, 1904, and January 18, 1904, and if so they came under the contract of 1904, and it was necessary for appellant to show this.

Argued orally by *F. H. Lotterhoss,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The stipulation by Badeau as to losses on customers with whom he dealt for the appellant, is not within the statute of frauds. His agreement was a part of the original contract under which he was to sell the goods, and was in no manner a collateral agreement. See *Timberlake* v. *Thayer,* 76 Miss., 76, 23 South., 767. Besides, it may be observed that it was not for the appellee to take one-half the gross profits, and then object to paying his half of the losses; the whole subject-matter being embraced in one single contract.

We think the proof of the losses is sufficiently clear to have been permitted to go to a jury. The thing to be ascertained was, not whether the customers were insolvent, but whether losses had been sustained; and, we think the evidence on this subject is competent, and of sufficient weight to have been submitted to a jury. The appellant should have been permitted to show losses by way of recoupment. The court, therefore, erred in giving the peremptory charge to find for the plaintiff.

Judgment is reversed, and cause remanded.

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FRANK H. BUSH ET AL. v. JESSE W. QUICK ET AL.

[43 South., 70.]

1. CHANCERY PRACTICE. *Appeal. Code* 1892, § 34 (*Code* 1906, § 35). *Interlocutory decree. Settle principles. Strangers to suit.*

A stranger to an equity suit, whose petition to become a party has been denied, cannot appeal from the denial to the supreme court, under Code 1892, § 34 (Code 1906, § 35), authorizing appeals from interlocutory decrees in order to settle the principles of the case.

2. SAME. *Intervention not a right. New suit. County district controversy. Election.*

The remedy of a person, claiming that a bill by taxpayers to enjoin the board of supervisors and election commissioners of a county from holding an election under an act providing for the division of the county into two court districts on the ground that the suit was filed by collusion between the parties, is by an independent bill against both parties, and not by intervening in that suit and making a new cause by a charge of collusion.

FROM the chancery court of Jones county.

HON. JAMES L. MCCASKILL, Chancellor.

Bush and thirty-two others, resident citizens, qualified voters and taxpayers of Jones county, the appellants, filed a petition in a suit pending in the chancery court of the county, asking to be made defendants thereto. The suit had been instituted a month before appellants filed their petition by several taxpayers of Jones county to enjoin the election commissioners and the board of supervisors of the county from holding an election under an act (Laws 1906, p. 206, ch. 169) providing conditionally for the division of the county into two court districts. Demurrers had been filed by the election commissioners and the board of supervisors to the bill of complaint, but steps had not been taken by the demurrants to expedite the hearing of the demurrers or to procure the dissolution of the injunction.

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Brief for appellants.

The petition for intervention charged that the complainants and defendants were acting fraudulently and in collusion to prevent the holding of an election under the act, and that the interests of all citizens and taxpayers of the county were concerned in the dissolution of the injunction; that the original parties to the injunction suit were merely nominal parties, without desire to secure a just and speedy hearing of the issues involved. Appellants sought to be made parties in order to press valid defenses which the original defendants had to the suit but would not press. After filing the petition and giving notice to the election commissioners and board of supervisors, the appellants, as if they were defendants to the suit, gave notice to the complainants that they would at a designated time and place move for a dissolution of the injunction on bill and demurrers thereto, they having filed demurrers for the board of supervisors and one of the election commissioners similar to those already on file. The appellants also filed in the suit affidavits in support of the allegations of their petition for intervention. Neither the complainants nor defendants assented in any way to the actions of appellants.

The chancellor overruled the application of appellants and declined to allow them to be made parties to the suit and denied them relief altogether. From a decree to that effect the appellants appealed to the supreme court. The issues between the original complainants and defendants remained undetermined at the time of the taking of this appeal.

The decision in the case of *Ross* v. *Quick,* 89 Miss., 29, s.c., 42 South., 281, was made in the same case as this one.

R. E. Halsell, T. H. Oden, and *O. C. Hunt,* for appellants.

The legislature of 1906 passed an act (Laws 1906, ch. 169) providing conditionally for the division of Jones county into court districts, the question of the division to be submitted to the voters of the proposed new district for determination by ballot. The present county courthouse of Jones

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county is at Ellisville, and the act provided for a new court-house to be at Laurel, if the vote resulted in favor of a new district. The proposed new district lies north of Ellisville, and the dividing line between the two districts, under the act, is between Ellisville and Laurel. The act required the county election commissioners to order an election to determine whether or not the division of the county into the two districts should be made.

About seven days before the date set by the commissioners for the election an injunction was sued out by Ross and others, taxpayers, most of whom resided in the southern district, or as we may call it, the Ellisville district; this injunction restrained the election commissioners from holding the election and enjoined the board of supervisors from proceeding in any way to carry out the provisions of the statute. Notwithstanding the injunction the voters of the territory to comprise the new district went to their respective precincts, and voted. But when the ballot boxes containing the votes were carried to the county site and tendered to the election commissioners, they declined to receive them and the ballot boxes with their contents were then delivered to the clerk of the circuit court of the county, where they now remain.

There are three election commissioners, two of whom reside in the Ellisville district and are opposed to the division of the county. The third commissioner, living at Laurel, is in favor of division. Three members of the board of supervisors, including the president of the board, live in the Ellisville district, and oppose the division. The two other members of the board live in the Laurel district, and are in favor of division. When the injunction was sued out the people of Laurel offered to employ solicitors, free of charge to the boards of supervisors and commissioners, to fight the injunction. This offer was by a majority vote declined. The two boards retained solicitors, well known to be opposed to the division, and refused to allow solicitors retained by the people of Laurel to

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be associated with them in the suit. The defendants to the suit declined to take steps to secure a dissolution of the injunction; thereupon the appellants, Bush and others, residents of the Laurel district, filed a sworn petition in the pending cause reciting the above facts, charging fraud and collusion on the part of the majority of the members of the two boards as to the injunction, and asking the right, as being the real defendants, to intervene and defend the suit. A copy of appellants' petition was served on the complainants and on the defendants in the suit, and notices were also served that the appellants would take affidavits in support of the allegations of their petition. Appellants also moved the court to dissolve the injunction. No denial of any kind was made by the complainants or by the defendants to the petition. On the hearing the chancellor held that appellants could not be permitted in vacation to intervene as defendants, and overruled appellants' motion to dissolve the injunction.

Appellants should have been permitted to intervene, and the chancellor should of his own motion have dissolved the injunction. A political election cannot be enjoined. *Gibbs* v. *McIntosh,* 78 Miss., 648; s.c., 29 South., 465.

A suit in equity cannot proceed without defendants, and the presence of merely nominal defendants in this case was insufficient. The real defendants had the right to be made parties. *Attala County* v. *Niles,* 58 Miss., 48; 15 Ency. Pl. & Pr., 674. All parties interested in a chancery suit must be made parties. 15 Ency. Pl. & Pr., 584. The parties in interest in a suit of this kind, seeking to enjoin an election to determine the division of a county, were the taxpayers and voters of the proposed new district. The petition of the appellants charged fraud, and was amply sustained by affidavits. It was the right and the duty of the trial judge to look fully into the matter, and if the appellants appeared to be interested parties they should have been made parties. It is but right that one who is interested in a cause, but not a party thereto,

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should be made a party where he requests it. 15 Ency. Pl. & Pr., 700. The court may order new parties to be made defendants to a suit. 15 Ency. Pl. & Pr., 740. All persons interested should be parties. *Shields* v. *Barrow,* 15 U. S., 158. The court may require an amendment making other parties to the suit if their presence is essential. *Bishop* v. *Miller,* 48 Miss., 364; *Shaw* v. *Millsaps,* 50 Miss., 380; *Clayton* v. *Merritt,* 52 Miss., 352.

As to how defendants may intervene, see 15 Ency. Pl. & Pr., 634. In equity intervention is either by petition or complaint. 11 Ency. Pl. & Pr., 506. One has a right to intervene if interested in a suit. II Ency. Pl. & Pr., 498. And the intervenor has the right of appeal. 11 Ency. Pl. & Pr., 15.

The chancellor has the authority to hear injunction suits in vacation; and he has the authority to make all orders necessary to bring the merits of the controversy to a right determination. When equity once takes jurisdiction it will retain it so as to adjust all matters and rights of parties concerned. *Railroad Company* v. *Brooks,* 66 Miss., 583, s.c., 6 South., 467; *Bank* v. *Duncan,* 52 Miss., 740; *Craig* v. *Doherty,* 61 Miss., 96; *Hale* v. *Bozeman,* 60 Miss., 965; *Newman* v. *Taylor,* 69 Miss., 670, s.c., 13 South., 831.

Appellants' petition charged fraud, and fraud was amply proven by affidavits and was denied by no one. It was within the authority of the trial judge to look into the facts, and if he should believe fraud was being practiced he should have dismissed the injunction suit. A friend of the court may call the court's attention to fraud. *Haley* v. *Eureka Bank,* 21 Nev., 127.

CALHOON, J., delivered the opinion of the court.

A bill was filed, styled *"Ross et al.* v. *Quick et al."* (see 89 Miss., 29; 42 South. 281), attacking the constitutionality of the act of 1906 (Laws 1906, p. 206, c. 169), dividing

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Jones county into two circuit and chancery court districts. The complainants were certain citizens and taxpayers against the board of supervisors and election commissioners, praying injunction against holding an election under the act, and that the act be declared void. Demurrers were filed by all the defendants. The appellants here, Bush and the others, intervened in that suit by petition to be made parties defendant in it, charging that it was filed by collusion for delay, and the petitioners, also citizens and taxpayers, wanted to press the dissolution of the injunction and final decree. The court refused to permit them to come in as defendants, and they appeal "to settle the principles of the case," leaving the main case below still pending and undetermined at that time.

There was no right to appeal under sec. 34, Code 1892, which has no reference to questions of practice. The remedy by independent bill against both complainants and defendants in the bill was complete, and their petition to be made parties involved no principles in that case to be settled. If they had filed an independent bill, and a demurrer to it had been sustained, they could have appealed under the statute. There was no right, in the pending suit, to make a new case by charge of collusion between the parties, thus presenting two issues.

Appeal dismissed.

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Brief for appellants.

GREENWAULD CHAMPENOIS v. PHINEAS TINSLEY ET AL.

[42 South., 89.]

1. SALES. *Conditional sale. Reservation of title. Waiver. Mortgage.*

The retention by the seller of title to personal property conditionally sold to secure the purchase money is not waived by his contemporaneously taking a mortgage from the buyer upon the same and other property to secure the debt.

2. SAME. *Implied waivers.*

The doctrine of implied waiver can be invoked to defeat implied liens, not express ones.

FROM the circuit court of Lauderdale county.

HON. ROBERT F. COCHRAN, Judge.

Tinsley and others, the appellees, were plaintiffs in the court below; Champenois, the appellant, was defendant there. The suit was an action of replevin, and plaintiffs recovered a judgment from which defendant appealed to the supreme court. The facts are fully stated in the opinion of the court.

F. V. Brahan, for appellants.

It is well settled in this state that the taking of promissory notes for personal property where the title to the property is to remain in the seller, or does not pass to the buyer until the note is paid, is valid. Brame & Alexander's Digest 1048 and cases cited, also 83 Miss., 362.

In *Ketchum* v. *Brennan,* 53 Miss., 596, it is held "Where by the contract of sale of personal property, the possession is given to the vendee, while the vendor retains the title until the purchase money, due in installments, is paid in full, the right of the vendor, as reserved by the contract, will be protected against a *bona fide* purchaser from the vendee, unless he has in some way waived the condition, or done or suffered something to mislead the purchaser from his vendee."

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It is not shown by this record, that appellants "waived the condition of their note or did or suffered anything done to mislead the purchaser from his vendee."

It is contended, however, that the taking of the deed of trust was a waiver of the note, and further, that as the deed of trust was not recorded until June 15, 1905, after Cunningham sold the mule to Brennan, that appellees are protected by sec. 2457 of the code which provides for the record of conveyances, and says "All deeds of trust and mortgages, whatsoever, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they be acknowledged, or proved, and lodged with the clerk of the chancery court of the proper county to be recorded," etc.

How is it to be determined as to whether the taking of the deed of trust was a waiver of the note? If by the facts, then the record shows expressly that there was no agreement or understanding between appellants and Cunningham that such was to be the case, and the record further shows the sole and only reason why appellants took the deed of trust, was to have other security in the event of the uncle's death. There was certainly nothing done, or suffered to be done by appellants that was misleading to appellees (the purchasers from their vendee); on the contrary, about August 1, 1905, the time appellees claim to have bought the mule, appellant's deed of trust was on record, having been recorded on June 15, 1905, and appellees could have easily ascertained the fact of the existence of the deed of trust, had they used due diligence.

The agreed statement of facts in this case shows that appellees surrendered possession of the mule to appellant's trustee without protest or resistance of any kind, impliedly, admitting their superior right, but subsequently, brought suit for the mule. The cases of "Waiver," Brame's Digest, 1231, are cases in which the statutory lien was held to have been waived by taking other security, but I have found no cases in point, with the instant case, and I submit to the court that the

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judgment of the lower court is unjust to appellants and that they should be permitted to retake their mule unless it is paid for, and I ask the court to reverse and remand the cause or enter the proper judgment. 54 Miss., 31, 57 Miss., 756.

No counsel appeared for the appellees.

CALHOON, J., delivered the opinion of the court.

On March 8, 1905, one Cunningham bought a mule from appellant, and gave his note for the purchase price, which stated that the title did not pass, but remained in Champenois until payment. Contemporaneously Cunningham executed a trust deed to secure the payment to the payee, which trust conveyance included the mule and also other property. Before this instrument was recorded, Cunningham sold the mule to an innocent purchaser, and through three or four successive sales it came to the Tinsleys, the appellees. The note not being paid at maturity, the mule was taken from the Tinsleys by the trustee without objection, sold by him, and bought by the appellant. The Tinsleys brought replevin, and the court sustained them, and decided that the mule was their property.

We do not concur in this conclusion. The doctrine of implied waiver in matters of this sort can only be invoked to defeat implied liens of vendors, liens given by courts of equity in the absence of express contract. Where there is express contract that the title be retained in the vendor, it is not waived by him by implication because he took the security of a trust deed. 29 Ency. (2d ed.) 776, and note 2, We have not seen a case contravening this view.

Reversed and remanded.

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Brief for appellant.

SARAH E. BRINSON v. MARY SANDIFER ET AL.

[42 South., 89.]

1. WILLS. *Deeds. Construction. Will or deed.*

A writing, not attested as a will, but acknowledged as a deed, conveying a life estate, followed by the words "I will" a second life estate to a daughter, and providing that after the death of the daughter the property "goes to her children and their heirs and assigns forever," is not a will but a deed to the second life estate as well as to the first one.

2. LAND AND CONVEYANCES. *Code* 1892, § 2436, *Succession of donees.*

Under Code 1892, § 2436, so providing it is competent by deed to convey lands to a succession of living donees, not exceeding two, and to the heirs of the body of the remainderman, and in default thereof to the right heirs of the donor in fee simple.

FROM the chancery court of Rankin county.

HON. JAMES L. MCCASKILL, Chancellor.

Mrs. Sandifer and others, the appellees, were complainants in the court below; Mrs. Brinson, the appellant, was defendant there. From a decree in complainants' favor the defendant appealed to the supreme court.

The facts are stated in the opinion of the court.

William Buchanan, for appellant.

The whole instrument must be construed together, the intent of the grantor ascertained, and the instrument upheld, if possible. *Goosey* v. *Goosey,* 48 Miss., 219.

The intent of the grantor seems to be clear that S. E. Gatlin should own the land during her lifetime and then it should belong to Mrs. Brinson.

He does not reserve the right to revoke any part of the instrnment and does not afterwards attempt to make any other disposition of it.

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The deed is complete, no further act on the part of T. C. Gatlin remained to give it full effect and the title is irrevocable. *McDaniel* v. *Johns,* 45 Miss., 632.

The title to Mrs. Brinson is in *presenti* though not to take effect in possession until after the death of Mrs. Gatlin (not T. C. Gatlin).

Sidney L. McLaurin, for appellee.

The instrument does not pass any title whatever to appellant Mrs. Brinson for two reasons:

First. It conveys from T. C. Gatlin, husband, to S. E. Gatlin, wife, a life estate, and then adds "and at the end of Mrs. S. E. Gatlin's life, I will this property to Mrs. Sarah Elizabeth Brinson all her lifetime, and after her Mrs. Sarah Elizabeth Brinson's lifetime, said described property goes to her children and their heirs and assigns forever." There are no words of conveyance to Mrs. Brinson in the instrument. It was only an expression of a desire on his part that, at his wife's death, the land should go to his daughter, Mrs. Brinson. If properly attested as a will it would have been good as a will, but not as a deed. There are no words of grant to Mrs Brinson.

Second. There is another reason why this writing could not be effective as a deed: Estates in fee-tail are prohibited. Gatlin attempted to convey the land to his wife, Mrs. S. E. Gatlin, for her lifetime, and at her death to his daughter, Mrs. Brinson, and at the death of Mrs. Brinson to her children, and at the death of Mrs. Brinson's children to their heirs. This carries it one step further than is allowed by sec. 2436, Code 1892, and created an estate in fee simple in Mrs. S. E. Gatlin; and at her death it descended to her heirs, appellees and appellants.

CALHOON, J., delivered the opinion of the court.

T. C. Gatlin owned the land in controversy, and executed, his wife joining, an instrument in which he says: "I hereby

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Opinion of the court.

grant, bargain, sell, convey and warrant to Mrs. S. E. Gatlin [his wife] her lifetime the following described property [describing the land], and at the end of Mrs. S. E. Gatlin's life I will this property to Mrs. Sarah Elizabeth Brinson [a daughter] all of her lifetime, and after her, Sarah Elizabeth Brinson's, lifetime said described property goes to her children and their heirs and assigns, forever." Mr. Gatlin died, and subsequently Mrs. Gatlin, the wife, died, and the children, except Mrs. Brinson and one other, file this bill for partition as heirs. Mrs. Brinson defends as sole owner under the above instrument for her life. The court below refused her contention and decreed the partition.

The purpose of the paper was manifestly to convey the property, and the use of the words "I will" at its conclusion does not destroy it as a conveyance. It is not attested as a will, and therefore void as such. It is acknowledged as a deed, *eo nomine*. The first part has the conveying clauses, and we decline to vitiate it as a conveyance and destroy the clear intent by making it a hybrid, half deed and half will, because of the misuse of a technical word. Clearly it passed immediate title, and was not intended to take effect after death. This instrument is within the exception allowed in sec. 2436, Ann. Code 1892. It is a conveyance to a "succession of donees then living and to the heirs of the body of the remainderman." It gives the property to Mrs. Gatlin for life, then to Mrs. Brinson for life, then to her children, who are the heirs of her body, in fee. *Banking Co.* v. *Field,* 84 Miss., 647, 37 South. 139.

Reversed, and decree here dismissing the bill.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. TOBIAS T. SMITH, EXECUTOR, ETC.

[43 South., 611.]

RAILROADS. *Deed to right of way. Release of damages. Construction. Surface water. Change of grade.*

A deed conveying to a railroad company for a right of way land in a street upon which it had already constructed and was operating tracks, reciting that the grantors "released the company from any and all damages, whether past, present or future, for the construction and operation of the tracks," does not release the company from damages resulting from a flow of surface water caused by the railroad company elevating the grade of the street and of its tracks.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

Smith, executor, etc., of the last will of Mary Comerford, deceased, the appellee, was plaintiff in the court below; the railroad company, the appellant, was defendant there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The suit was for damages to the land of decedent caused by defendant raising the grade of the street in front thereof, on which grade defendant's tracks were constructed and operated.

The first count of the declaration was predicated of the raising of the grade of the street above the established grade fixed by the city and above the property of the plaintiff; and the second charged that in the maintenance of its tracks the defendant carelessly and negligently permitted the drains and sewers to become clogged, thereby preventing the drainage of surface water from decedent's property. The defendant pleaded the general issue, and on the trial offered in evidence a deed from Mary Comerford, plaintiff's testator, conveying

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Statement of the case.

to it a right of way in front of her property and releasing it "from any and all damages, whether past, present, or future, for the construction and operation of its tracks along said street in front of said property." Plaintiff objected to the introduction of this deed. The court sustained the objection, and, after all the evidence was taken, instructed the jury that, if they believed from the evidence the defendant raised the grade level of the street in front of plaintiff's property and thereby damaged it, they must find for plaintiff and assess such damages as had been caused by the raising of the street. Appellant contended that the deed released it from all damages for the construction as well as the operation of the tracks and that the raising of the grade of the street being construction work, was permitted, and, since the declaration did not charge negligence in the raising of the grade of the street, the deed should have been admitted in evidence. The appellee contended that since, at the time of the execution of the deed, the road was already constructed and in operation, the deed was immaterial to the issue, unless it gave the railroad company the right to raise the grade of the street; that it was the raising of the grade of the street which caused the damage; that the city itself had no right to raise the grade to the damage of appellee's property; and the railroad company had no higher right or authority than the city.

The deed was as follows:—

For and in consideration of the sum of seven hundred and fifty dollars and thirty-seven cents to me in hand paid, the receipt of which is hereby acknowledged, I, Mary Comerford of Vicksburg, Mississippi, do bargain, sell and convey unto the Yazoo & Mississippi Valley Railroad Company, a corporation under the laws of the state of Mississippi, and to its successors and assigns a right of way for a single or a double track, along Levee street in the city of Vicksburg, county of Warren and state of Mississippi, in front of any property owned

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by me in square 64, original plat of the city of Vicksburg, and for the consideration aforesaid *I do hereby release the said Yazoo & Mississippi Valley Railroad Company, its successors and assigns and also the Louisville, New Orleans & Texas Railway Company from any and all damages, whether past, present or future, for the construction and operation of its tracks along said street in front of said property.*

Witness my signature this 7th of November, 1893.

[Signed] MARY COMERFORD. [Seal.]

C. N. Burch, and *Mayes & Longstreet,* for appellant.

The best rule with respect to the grant of right of way and to the release of all damages, past, present and prospective, which may occur from the construction and operation of railroad tracks, seems to be that by such a grant of right of way and such a release the landowner is cut off from all damages, except those which may result from a negligent operation and construction.

In other words, if any construction or work in operation is not shown to have been unnecessary and negligent, even if necessary, the plaintiff cannot recover. A release covers and precludes claims and suits on account of any work which was necessary and proper, and which was non-negligent.

The court will find in the case of *Fremont & Missouri, etc., R. R. Co.* v. *Harlin,* 36 L. R. A., a very full consideration of the principle which controls in such cases, with a collocation and examination of many of the leading cases in point. In this case the proposition is clearly asserted that a release of all prospective damages to result from the construction and operation of the road precludes the landowner and his grantees from any claim of damages from anything done in operation and construction, unless it is distinctly averred and shown by the evidence to have arisen from a negligent construction or a negligent use.

There is no presumption of negligence in a case like this.

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Brief for appellee.

It makes no difference that changes of grade and elevations may be averred. It is essential that the change and elevation shall be expressly averred to have been negligently done, and that the proof offered should sustain the allegation.

Mrs. Mary Comerford's deed, granting as it did a right of way for tracks, and releasing, in words as strong and plain as they may be made all damages, past, present and future, on account of the construction and operation of the track or tracks, should be held to have been executed by her with full knowledge, and in full view of, all the exigencies of proper railroad construction and operation.

After the grant of a right of way on a street, and the waiver of all damages which are expressly made to apply to all prospective damages and when this is done for valuable consideration, the grantor and those claiming under her, should be held to be precluded from a claim for damages on every slight change or alteration in the track or roadbed.

Mrs. Comerford's deed should have been admitted in evidence, and, on it and the other proof as shown by the bill of exceptions, the peremptory instruction should have been granted to the defendant company on the first count in the case.

Bryson & Dabney, for appellee.

We think this case is controlled by the *Connors case* reported in 86 Miss., 356, 38 So. Rep., 320.

The deed in that case provided as follows: "I hereby release and receipt for in full all damages heretofore done or which may hereafter be done in the operation of said railroad over and along said street. This release, however, not to extend to, nor permit the unlawful operation of the said railroad over said street in the running of cars, or otherwise."

It will be observed that the deed in the case at bar releases damages for construction as well as operation and because of the addition above it was contended below that it was ad-

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missible, that the raising of the grade being construction work was permitted by the Comerford deed and to that extent was more potent than the Connors deed which contained no such provision.

It will be observed furthermore that the deed in the *Connors case* expressly excepted by its terms "the unlawful operation" of the railroad, whereas in the Comerford deed no such exception is found.

Counsel below contended that while this court has construed the Connors deed and held that it did not grant any right to raise the grade of the street, that the Comerford deed by reason of the release from damages for construction authorized the raising of the grade of the street.

Our view of the law is that it makes no difference whatever whether the raising of the grade of Levee street was negligently done or not, whatever damage was sustained by the plaintiff below was caused solely by the fact of raising the grade and not by the fact that it was done negligently. It was the elevation of the street that made ingress and egress to plaintiff's property difficult and caused damage, and not the fact of negligence in the work of elevating the same. It was the pile of earth in front of plaintiff's property that caused the damage, not negligence in the act of piling it. It might have been piled ever so carefully and skilfully and have shut off ingress and egress just as effectively and have ponded the water upon plaintiff's property just as deep.

Any change of grade was unlawful. The city could not lawfully change the grade of the street, and certainly the railroad could have no higher right or authority over the street. This was the holding in the case of *Lefoldt* v. *Yazoo, etc., R. Co.*, 87 Miss., 317, s.c., 39 So. Rep., 459, a case involving almost identical facts to the case at bar.

The raising of the grade of the street in front of plaintiff's property was in the nature of a change of the plan of con-

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struction of the railroad and warranted a new assessment of damages.

So far as we have been able to find all of the authorities hold that where there has been a change in the plan of the work after the assessment of damages a new assessment may be had, provided additional damage resulted from such change.

Mr. Mills in his work on Eminent Domain, sec. 219, states the rule as follows:—

"When damages have been assessed according to a certain plan, which would cause certain damages, it would be inequitable to allow the adoption of a new plan, more injurious to the owner, without providing for a new assessment. If the company build in a different manner from the plan proposed, and according to which damages have been assessed, they may be restrained from construction until the additional damages are assessed. . . .

"When the damages have been settled by agreement and afterward there is a change of plan, involving more damages, the owner may demand an assessment under the statute, and the same rule would apply if damages were assessed by regular proceedings. There may also be a recovery on the case or on the implied undertaking to construct according to the plan."

To the same effect is Sutherland on Damages (3d ed.), sec. 1090, as follows:—

"It is conclusively presumed after judgment that it embraced all damages and benefits of every kind naturally consequent to the taking; in judgment of law all such were foreseen and compensated for or allowed, and no others. But this does not preclude a fresh demand if the plan of the public work is changed after the assessment so as to make the effect of the appropriation more injurious, or if the property taken is applied to a different use."

The case of *Wabash R. Co.* v. *McDougal,* 126 Ill., 111, is exactly in point. *McCormack* v. *Kansas City R. R. Co.,* 57 Mo., 433; *Fremont, etc., R. Co.* v. *Harlin,* 36 L. R. A., 417;

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Dissenting opinion.

Davis v. *Yazoo, etc., R. R. Co.*, 73 Miss., 678, s.c., 19 South., 487; *Kansas City, etc., R. R. Co.* v. *Smith*, 72 Miss., 677, s.c., 17 South., 78; *Kansas City, etc., R. R. Co.* v. *Lackey*, 72 Miss., 881, s.c., 16 South., 909; *Railroad Co.* v. *Wilbourn*, 74 Miss., 284, s.c., 21 South., 1.

CALHOON, J., delivered the opinion of the court.

The case was proceeded with without regard to the technical structure of the declaration. There is an agreed bill of exceptions showing that appellee's testator, after the construction of the road, had conveyed to appellant a right of way along Levee street in front of the property, which conveyance concludes in these words: "I do hereby release the said [the railroad company] from any and all damages, whether past, present, or future, for the construction and operation of its tracks along said street in front of said property." This conveyance the court refused to admit in evidence, and this refusal is the whole case, because it is admitted that the railroad company raised the grade of the whole street about three feet above that at the date of the deed, and that this raise in the grade of Levee street in the city of Vicksburg caused the damage. The deed releases all damages arising out of the "construction and operation of its tracks." At that date the road had been constructed and was in operation, and the contract cannot be interpreted to mean, in the use of the word "future," that grades of the street might be elevated, so as to flood the property, without complaint. This would be an unreasonable construction.

Affirmed.

MAYES, J., delivered the following dissenting opinion.

I am unable to concur in the conclusion reached by the majority of the court in the affirmance of this case, and think it should be reversed. There is a very marked difference between the rights which one may get in property by virtue of

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eminent domain proceedings and the rights which he may acquire by express contract. The cases cited by counsel for appellee, announcing the circumstances under which a railroad company may become liable to the owner of land taken by virtue of eminent domain proceedings for damage additional to that which was allowed in the original taking of the land, have no analogy to the case presented for decision by this court. Where land is taken by virtue of eminent domain proceedings, there is a residuum of right left in the owner, to be called into play under certain circumstances where damage has been occasioned in a manner not contemplated in the allowance of damage in the original proceeding. This may also be true in cases of the acquisition of land by virtue of private contract. But there is no case which holds that every right which an owner may have in respect to the use which is to be made of the land and damage occasioned thereby may not be contracted away. In this case the owner by the express contract "releases the Yazoo & Mississippi Valley Railroad Company, its successors and assigns, and also the Louisville, New Orleans & Texas Railway Company, from any and all damage, whether past, present, or future, for the construction and operation of its tracks along said street in front of said property," and this release is made for and in consideration of the sum of $745.37 in hand paid to the grantor of the deed. The agreed facts in this case show merely that the appellants raised and elevated the grade of Levee street in front of the property described, to the height of something like three feet from the grade of the street as it was established when the deed was made to the railroad company. The agreed facts further show merely that the elevation as established by the railroad company is in excess of the grade of the street. This is all the testimony in the case, except that it is further shown by agreement that by virtue of this elevation the water was held and dammed up, thereby occasioning damage to the property. Appellees offer in evidence a deed from their grantor which contained the re-

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lease above specified, and, on its being objected to, the court sustained the objection and declined to let the deed be read in evidence.

This being all the evidence before the court, a peremptory instruction was given to find for plaintiff and assess such damage as would be directed to be assessed by other instructions. The second instruction tells the jury that "private property cannot be damaged for public use, or *quasi*-public use, except on due compensation being made to the owner or owners thereof; and if the jury believe from the evidence in the case that defendant raised the grade on Levee street in front of plaintiff's property they shall assess damage," etc. The third instruction tells the jury to find for the plaintiff and to assess damage for the raising of the grade of Levee street in front of the property, etc. Thus it is seen, notwithstanding this contract releasing the railroad company, from all liability for any and all damage, whether past, present, or future, in the construction and operation of its tracks along said street in front of said property, liability is made to depend upon the sole fact that the grade of the street had been raised. Liability is not made to depend upon whether or not the raising of the grade of this street was negligently done in any way; but the jury are told peremptorily to find for the plaintiff if they believe from the evidence that the appellants raised the grade of Levee street. The very thing for which the appellees had received the consideration of this deed was to give the appellants the right to construct and operate its tracks along the street. This right is what the appellants bought and paid for, and they paid to be released from any and all damage accruing to the owner by the exercise of this right. Of course, even under this contract, appellants could not, by negligence in the construction of their road, injure appellees without being liable for damage; but there is no hint in this record that the injury occasioned the appellants was by virtue of any negligence on the part of the railroad, unless it can be affirmed that the mere fact that ex-

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ercising the right which they had paid for, and which may have involved the necessity of raising this grade, in itself constituted negligence. I do not think it does *per se,* and this the opinion of the majority so declares. It is true that the railroad company may not have had the right to raise the grade of the street in so far as the rights of the city were involved, even though they could not have made the right obtained from appellee by virtue of their contract otherwise useful to them; but this would be a question between the city and the railroad company. Because it would be unlawful for the railroad company to raise the grade of the street in so far as the city was concerned, it does not follow that adjacent property owners may not release the railroad company from private damage occasioned by this unlawful act in so far as individual rights are affected. It may also be true that the city itself could not raise the grade of this street, without being liable to appellee for any damage occasioned by virtue of the raising of the grade of the street; but it does not follow, even though the city should be liable, that appellee might not contract away whatever right he might have to claim damage on account thereof.

In the case of *Y. & M. V. R. R. Co.* v. *Lefoldt,* 87 Miss., 317, 39 South., 459, there is no such question involved as is in the case we are now discussing. In the case referred to *supra* there was no contract involved whereby the railroad company had been released, for a valuable consideration, from any and all damage, as is the case here. In that case Lefoldt sued the Yazoo & Mississippi Valley Railroad Company for damages to his property caused by raising the grade of the street in front of him. The facts showed that the railway company raised the street several feet, and that by this act Lefoldt's property was damaged. The facts further showed that there was a grade of the street established, and the street paved with rock by the city of Vicksburg, and that this was raised by the railroad company by a deposit of gravel, and that it was not necessary to raise the grade in order to keep the roadbed

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in repair. In defense the railway company offered to prove that under an ordinance of the city of Vicksburg it was required of the company that it gravel this street and keep it graveled, and it was further required that the railroad company keep the rails of its track flush on a level with the street; that from time to time the mayor and board of aldermen would notify the defendant company to put gravel on the street, and in pursuance of this notice the company have several times each year spread gravel on the street; and that the effect of this had been to raise the street, and in order to keep the track level or flush with the street they raised their track to correspond with this raised grade. his proof was objected to, objection sustained, and the defendant excepted; and this court, through Justice CALHOUN, said: "It is not easy to find in this an authority to raise the street or change the grade. But we think the result should be the same if it did. The city must have the power before it can transfer it to appellant, and it did not have the power to do damage to appellee without previous compensation." *Non constat* the court would not have decided this case this way, and held the company liable for damage at the suit of Lefoldt, if Lefoldt had for a valuable consideration made a contract with the railway companies releasing them from any and all damage in the construction and operation of its tracks along this street; it not being shown that the railway company was guilty of any negligence in so doing.

The case of *Conners* v. *Y. & M. V. R. R. Co.*, 86 Miss., 356, 38 South., 320, is easily distinguished from the case we are now discussing, in that the contract between the parties was very different. In the *Conners case,* where the deed is very much the same as the deed here, in which a release is executed for all damage done, or which may hereafter be done, in the operation of the railroad over and along the street, we also find the following provision in the contract, viz.: "This release, however, not to extend to nor permit the unlawful operation of

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said railroad over said street, in the running of cars or otherwise." The facts in the *Conners case* show that the railway company filled in the street in front of the property, raising it several feet above the established grade, thereby preventing ingress to and egress from plaintiff's lots; and the court said, through Chief Justice WHITFIELD: "We think the construction of the Ripley deed is that it is simply a release of all damage caused by the operation of the railroad along the right of way." The damage here complained of resulted from the unlawful elevation of the street and the track in front of plaintiff's lots. The express language in the release provides that "this release, however, not to extend to nor permit the unlawful operation of said railroad over said street, in the running of cars or otherwise." In the two cases cited above, though the language of the court seems to make the liability of the railway company depend upon the mere fact that the grade of the street was raised, yet the language of the court must be interpreted in the light of the facts presented by each of the two cases above decided. In the one case—that is to say, in the *Lefoldt case*—there was no contract at all releasing the railway company from liability, and, of course, it was liable for any damage caused by an unlawful act. The mere raising of the street and the consequent damage to the property being an unlawful act, and the parties having no contractual relation, the company was held liable, because in the original assessment of damages no damage was allowed on the idea that any unlawful act would be done. In the *Conners case,* though there was a contract, by express stipulation in the deed it was expressly said that "this release does not extend to nor permit the unlawful operation of said railroad over said street, in the running of cars or otherwise." The raising of the street several feet being declared by the court to be an unlawful act, and the contract itself expressly stipulating that the railroad company should be liable for any unlawful act, it necessarily followed, and the court held, that the railway company was liable. In this

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Statement of the case.

case there is no reservation; but in so far as the appellees have any right at all, save for negligence on the part of the company, they have expressly released the railroad company from any and all damage in the construction and operation of its tracks along this street in front of this property, and the evidence failing to show that the appellant has done anything but raise the grade of the street, and not showing any negligence in any way, it is my view that this case should be reversed. I think the exclusion of the deed was error, and that each and every instruction granted for plaintiff was erroneous.

There is no question presented here of the taking or damaging of private property for public use, save by the express contract of the parties.

SCIPIO DAVIS v. STATE OF MISSISSIPPI.

[43 South., 81.]

CRIMINAL LAW AND PROCEDURE. *Evidence. Best evidence.*

In a trial for perjury, charged to have been committed before a justice of the peace court in the trial of one charged with crime, it is incompetent to prove by the justice of the peace the contents of the affidavit on which the prosecution before him was based; the record being the best evidence.

FROM the circuit court of Lafayette county.

HON. JAMES B. BOOTHE, Judge.

Davis, the appellant, was indicted for perjury, tried and convicted and sentenced to the penitentiary for three years, and appealed to the supreme court.

The charge against appellant was predicated of his testimony in a criminal case before a justice of the peace.

On the trial in the circuit court of appellant for the alleged perjury the justice of the peace, Tatum, before whom appellant had given testimony, was called, as a witness for the

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state, and permitted, over the objection of appellant, to testify, touching the issue in the suit before him and to state the contents of the affidavit the basis of the record in the case. On appeal by appellant from conviction and sentence to the supreme court the action of the court below in admitting oral testimony on the trial of appellant of the matters above stated, was assigned as error. Appellant contended that the record of the justice of the peace was the only proper evidence of its contents.

W. V. Sullivan, for appellant.

It was error to permit the justice of the peace, Tatum, to testify from remembrance what the charge in his court against Barry was. The record was the only proper evidence. *Whittle* v. *State,* 79 Miss., 327; 30 South. Rep., 722; *State* v. *Ireland,* 42 South. Rep., 797.

R. V. Fletcher, assistant attorney-general, for appellee.

The proof shows that the appellant was duly sworn as a witness, before a justice of the peace, on the committing trial of one Barry for cutting one Tubbs, and that appellant swore that just prior to the cutting Tubbs, the injured party, had hold of Barry, the defendant, and was kicking him. The proof in this case shows that nothing of the sort happened, and, furthermore, that the appellant, Davis, did not even see the affair.

There was ample proof against appellant to support the jury's verdict.

CALHOON, J., delivered the opinion of the court.

This was a conviction of perjury, based on testimony of appellant on the trial of one Simpson Barry before a justice of the peace. On the trial of appellant for the alleged perjury in the circuit court, the justice of the peace, as a witness for the state, was permitted, over objection and exception, to testify what the charge was for which Barry was on trial before

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Brief for appellant.

him. It was fatal error to admit oral testimony of this. The record itself was the only proper evidence. *Whittle* v. *State,* 79 Miss., 327; 30 South., 722; *State* v. *Ireland* (Miss.), 42 South., 797.

We decide nothing else in this case now.

Reversed and remanded.

CHARLES G. SELF *v.* STATE OF MISSISSIPPI.

[43 South., 945.]

CRIMINAL LAW AND PROCEDURE. *Evidence, Exhibits. Experts.*

Where the condition of decedent's skull at the time of his death was a material enquiry, the testimony of experts who did not see it until disinterred two years afterwards and the skull itself were inadmissible in evidence, where it had decayed to such an extent that the witnesses could not do more than speculate touching its condition at the time in question.

FROM the circuit court of Attala county.

HON. JOSEPH T. DUNN, Judge.

Self, the appellant, was indicted and tried for the murder of one William Proctor, was convicted of manslaughter, sentenced to the penitentiary for a term of eight years and appealed to the supreme court. The facts touching the point on which the case was decided sufficiently appear from the opinion of the court.

Daniel & Adams, for appellant.

It would have been error to have permitted the introduction of the whole skull, intact, unless the prosecution had first shown that the then condition of the same, with reference to the alleged wound and injury, was the same as at the time in issue, to-wit: immediately after the infliction of the said alleged wound.

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"The present condition of an object offered may not be the same as at the time in issue, nor so nearly the same as to be proper evidence of its former condition; accordingly, autoptic proference is allowable only on the assumption that the condition is the same or sufficiently similar." 2 Wigmore's Evidence, sec. 1154, subd. (6). "The fact that a post-mortem examination was made long after death is no reason in itself for its exclusion as evidence, if the body was in such a state of preservation that the jury could judge whether its condition was caused by injuries inflicted before or after death." 21 Ency. Law & Procedure, 947, sub. (111).

If such great precautions should be observed as a prerequisite to the proper introduction of the entire skull, intact, then it follows *a priori* that even greater precautions should have been taken before permitting the introduction of a small section of skull.

The section of skull introduced was not properly identified and authenticated with reference to the alleged wound, the extent and location of same.

Teat & Teat, on the same side.

The practice of the prosecution to disinter the body of the deceased during the trial of the case and spring it as a surprise on the defendant, his counsel and the jury in open court without any notice whatever to the defendant seems to be growing in popularity in this district, it having been done here before in the trial of the *Bell case* which has been twice reversed by this court. As to how well the practice comports with justice or fairness we leave for others to judge, but considering the ghastly and appalling effect of a description of the kind and character of the one at bar, together with an exhibition of portions of the skeleton to the jury, coming as a complete surprise, we think the state should at least in the execution of its nice little effort at tragedy, be required to conform to the ordinary rules of evidence, that where an ex-

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hibit is introduced in evidence the whole of the exhibit should be brought in. If the jury are to conclude that the fractures in the section of skull were produced by a blow from the defendant, they should have an opportunity to see likewise for themselves that there are not similar fractures and cracked portions of skull on the other side and parts of the head. We contend that the introduction of this portion of skull was incompetent for many reasons; that it was not properly shown in fact to be a part of the skull of the deceased, that two years had elapsed since the death and burial of the deceased, and that decay and disintegration of bones and the joining of bones in the skull had so set up that the physical appearance of the section of skull was necessarily so badly exaggerated and distorted as to sweep the mind of the jury beyond rational moorings in a fair consideration of the evidence, accompanied with the fact of the dramatical display of the prosecution and natural surprise produced on the mind of the jury by the unusual evidence of the disinterment of the corpse and its condition of preservation, etc. Clandestine performances of the kind here in evidence not in conformity with the provisions of the statute in such cases made and provided should be discouraged by the courts, because, like dying declarations, the opposite party is placed at disadvantage and great opportunity is afforded for mischief.

The proper course to pursue in a case where death has followed an injury which seems insufficient alone to produce death is for the coroner or court to order a post-mortem examination (Code 1892, § 824, 31 L. R. A., 540).

The result of such examination should be excluded where the interval is so long and the condition of the body is such that the jury could not reasonably find whether its condition was attributable to ante-mortem or post-mortem causes. Hughes Criminal Law, p. 40.

R. V. Fletcher, attorney-general, for appellee.

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Opinion of the court.

Argued orally by *J. A. Teat,* for appellant, and by *R. V. Fletcher,* attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

After the most careful consideration of the evidence in this case, we are clearly of the opinion that the part of the skull exhibited to the jury in this case and the evidence as to the post-mortem examination should all have been excluded from the jury. This post-mortem examination occurred two years after the burial of the deceased. The evidence shows strongly the action of the elements of decay upon the skull. Only half of the head was brought before the jury, and that half in several fragments, requiring to be held together, as indicated by the evidence. The post-mortem examination was *ex parte,* without notice to the defendant. It is not a case of a post-mortem examination made within any recent time after burial, but one made, as stated, two years thereafter.

Three physicians were examined—two for the state, and one for the defense—as to whether the condition of the skull was substantially the same at the time of its exhibition to the jury as it was when the deceased died, and there is anything but harmony between the physicians on this subject. Dr. Turnipseed, speaking in response to the question, "Was it fractured to that extent when you made your examination?" replied: "No, sir; it was not. If it had been, I would have felt that giving away feel, and I didn't do it." He says again: "I pressed with great pressure over the wound, and could not detect any deformity whatever. I could not cause the bones to sink down—any sinking, giving away, or boggy feel. I could not detect any softness by palpating or pressing around the wound on the surface." And again he said: "It seems to me like it would be a very easy matter to detect a fracture in this condition [*i. e.,* the condition of the skull when exhibited to the jury]. It seems to me like most any child could detect the fracture in this case, and the slightest little

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pressure in such a fracture as that would produce a boggy feel, with pressure." Dr. Coleman on the cross-examination very sensibly observed: "I will say this. It is unfortunate that you have not got the whole skull, because, as I understand it, this man has been buried two years." Dr. Carnes testifies, in speaking of the condition of the body in the grave, that he found the skeleton lying there; that, of course, the flesh had all rotted; and that he separated the head from the body and lifted it out. He says, further, that the skull was lying attached to the body, and was covered with mold and decayed matter, so much so that the breaking at first was not so apparent, but that on closer examination he found that the skull was crushed, so much so that a little pressure there caused a little part of it to fall in. He says the whole skull was in a natural position at the time he found it, and that he separated the part of the skull exhibited to the jury with a bone saw, and removed the part that showed the effects of the injury, with the exception of about one-half an inch, where the cracked part ran so far back that he did not notice it until he had sawed through. He also stated that, from the general crushing of the bones on the left side of the head, it was necessary to place cotton therein. He further says that the fractures were all broken out clear, so that, in examining the bone, those fractured parts dropped out, and that the part exhibited to the jury was all absolutely broken in, so that it fell out almost on touch, and that they were broken before the examination, and that, as he continued the examination, to see the extent of the fracture, all those pieces dropped in, and he took them out of the decayed matter inside of the head, so that he could place them back in position. He further says that the inner wall or lining was all decayed, and that that was the reason the parts dropped in.

It must be noted that we are not speaking of this testimony with respect to the single fact as to whether the skull was the skull of the deceased, in other words, with respect to the iden-

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tification of the skull. We are dealing solely with the question of the competency of this evidence, as showing with the clearness that it ought to have been shown that the skull, granting it to be the skull of the deceased, was in the same condition at the time of its exhibition to the jury that it was in at the time of the burial. On this proposition the rule is thus laid down in Wigmore on Evidence, sec. 1154, subd. 6: "The present condition of an object may not be the same as at the time in issue, nor so nearly the same as to the proper evidence of its former condition. Accordingly, autoptic proference is allowable only on the assumption that the condition is the same or sufficiently similar." That is the precise point. Was the evidence in this case, on this subject, proper evidence of the former condition of this skull? It must be admitted that this is a character of evidence quite likely to unduly weigh with the jury, and for that reason its admission should be most scrupulously guarded. All the proper preliminary evidence should be clear and satisfactory. It is said in 2 Wigmore on Evidence, sec. 1157, at p. 1354, after reviewing the cases: "There is a natural tendency to infer from the mere production of a material object the truth of all that is predicated of it. Second, the sight of deadly weapons, cruel injuries, etc., tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence." All this applies with marked emphasis to the production before an average jury of the skull of the deceased.

Weighing the matter carefully, we are constrained to think this testimony falls far short of measuring up on the point indicated to legal requirements, and for this error alone, not now passing on any other assignment, the judgment is reversed, and the cause remanded for a new trial.

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Statement of the case.

WILLIAM J. COKER v. MAY BREVARD.

[43 South., 177.]

BONDS. *Penalty. Liquidated damages. United States mail. Subcontractor.*

A bond given to a contractor by a subcontractor to secure the carrying of the United States mail between designated points, with a stipulation that the amount should be deemed as liquidated damages, is nevertheless penal and only actual damages can be recovered for its breach.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Mrs. Brevard, the appellee, was plaintiff in the court below; Coker, the appellant, and others were defendants there. From a judgment in plaintiff's favor the defendant appealed to the supreme court.

The appellee, having a government contract for carrying the United States mail over a star route, entered into a written subcontract with one Hillerman by which he agreed to carry the mail over the route for a term of years, she agreeing to pay him therefor $550 per annum. This subcontract was in the form of a bond with sureties for the faithful performance of the contract, and was duly signed by Hillerman as principal and by appellant Coker and one Murphee, as sureties. Excluding the formal parts, it read as follows:

"The said party of the second part (Hillerman) and his sureties do jointly and severally undertake, covenant and agree and bind themselves and each of them to and with the party of the first part (Brevard) in the sum of $800 to transport the United States mail on the said route, from Okalona by Parkersburg to Houston, and back six times a week, from November 1, 1900, to June 30, 1904, inclusive, upon such schedule as the postmas-

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Statement of the case.

ter-general may direct, and in compliance with the postal regulations, and subject to the requirements of the party of the first part (Brevard) under her contract with the United States Government, for $550 per annum. . . . It is hereby further agreed that in case of failure or refusal by the party of the second part (Hillerman) to perform the mail service herein provided for, then the sum of $800 hereinbefore stipulated shall become immediately due to the party of the first part as liquidated damages and not as a penalty, and, in default of payment thereof, may be recovered in an action of debt."

Hillerman failed to carry out the contract or to make effort to do so, and neither of his bondsmen, though promptly notified by appellee in writing, would do so. Appellee thereupon made other arrangements to have the mail carried, and in March, 1901, brought an action of debt for $800 and interest from November 1, 1900, the date of the breach of the contract. The two sureties, Coker and Murphee, were duly summoned by appropriate process, but no service was ever obtained on Hillerman. Murphee made no defense. Coker defended on the ground of his own intoxication at the time he signed the bond; and contended on the trial that Mrs. Brevard was not entitled to recover the $800 as liquidated damages, but could only recover actual damages. The evidence was conflicting as to the extent of Coker's intoxication when he signed the bond. The actual damages sustained by appellee by the breach of the bond amounted to $553. The jury returned a verdict for plaintiff against the defendants, the sureties, for $800 with interest, the full sum demanded, and judgment was entered accordingly. The court below granted plaintiff an instruction to the effect that "if the jury believed from the evidence that the defendants, Coker and Murphee, signed the bond freely and voluntarily and with knowledge of its contents, they must render a verdict for the plaintiff in the sum of $800, the amount named in the bond as liquidated damages, with interest at six per cent. per annum from date of breach," and refused

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Brief for appellant.

to grant an instruction, asked by the defendants, limiting recovery of plaintiff to actual damages sustained by her, the excess paid out by her for the transportation of the mails over and above what she would have been required to pay Hillerman under the contract.

McFarland & McFarland, for appellant.

It was error in the lower court to grant the first instruction asked by the plaintiff. This instruction charged the jury that if they believed from a preponderance of the testimony that the defendants signed the bond freely and voluntarily and with a knowledge of its contents, they should render a verdict for the plaintiff for $800, the amount named in the bond as liquidated damages, with legal interest thereon. It was, in equal degree, error in the lower court to refuse to grant the first instruction asked by defendant, limiting recovery to actual damages sustained by the plaintiff, the excess of the cost to plaintiff of the transportation of the mails during the existence of the contract, over and above what it would have been if Hillerman, the subcontractor, had transported it according to the terms of the contract with plaintiff.

The amount, $800, named in the bond, should have been considered as a penalty, not as liquidated damages. 7 Pac. Rep., 548. But under the first instruction granted to the plaintiff, Coker, the appellant (defendant below), as surety would be responsible to plaintiff for $800 if Hillerman, the subcontractor, failed to carry the mail only one day during the four years covered by the contract, even though the actual damage to plaintiff would not have been in excess of $2.50. That is to say, if the subcontractor had faithfully performed his contract year in and year out until the very last day of the contract period, plaintiff could still recover $800 damages, if the subcontractor failed on the very last day of the period. Certainly this cannot be the law. In nearly every case to be found, where the amount mentioned in a bond has been held

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to be liquidated damages, that amount is so much per diem, and not a lump sum, thereby making the damages for a breach of a few days much less than for a more extended duration of weeks or months. See *Wilhelm* v. *Eaves,* 14 L. R. A., 297, and cases there cited. Also, 1 Suth. Dam. (1882), 521.

An amount plainly in excess of just compensation for breach of contract cannot be arbitrarily fixed as liquidated damages. It is only where the damages are not susceptible of calculation, or where the amount has been reached by fair calculation, that a sum agreed upon as liquidated damages will be suffered to be recovered as such. *Chicago, etc., Co.* v. *United States,* 53 L. R. A., 122, 106 Fed. Rep., 385.

The damages recoverable by the plaintiff in this case should have been the difference between the cost of a fairly chosen transportation agent employed after the failure of Hillerman, the subcontractor, and the cost to plaintiff of the transportation which failed; an amount easy of ascertainment. 13 Cyc., 93; *Bright* v. *Rowland,* 3 How. (Miss.), 398, 1 Suth. Dam. (1882), 478, 13 I. R. A., 671, 19 Am. & Eng. Ency. Law (2d ed.), 396, 10 L. R. A., 826 and notes, 28 L. R. A., 487.

George C. Paine, on the same side.

It was error in the court below to grant the first instruction asked by the appellee, and to refuse the first instruction asked by appellant. "In determining whether an amount in a contract is to be taken as a penalty or as liquidated damages, courts are influenced largely by the reasonableness of the transaction and are not restrained by form of the action or agreement nor by the terms used by the parties, nor even by their manifest intent, and if the instrument provides that a larger sum shall be paid, on the failure of the party to pay a less sum, the larger sum is a penalty, and where the damages are capable of being known and estimated, the sum fixed upon as damages will be treated as a penalty, although declared to be intended as liquidated damages." 13 Cyc., 93.

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Brief for appellee.

The rule of construction of contracts such as the one here under consideration has been laid down by this court in the opinion of Justice SHARKEY in *Bright* v. *Rowland,* 3 How. (Miss.), 398.

E. O. Sykes, Jr., for appellee.

The principal question here is whether the $800 mentioned in the contract between appellant and the subcontractor should be considered as liquidated damages or as a penalty. Opposing counsel contend that it should be considered merely as a penalty, and that the appellee, as plaintiff below, could legally recover only the amount of her actual damages.

Whether a sum mentioned in a contract of this kind is meant for liquidated damages or a penalty is, generally, considered a question difficult of solution; and the authorities show many shades of difference and distinction, some absolutely without merit. But while many distinctions exist, there are certain well-established rules to which we may look to determine the interpretation of the contract. These rules, when considered together, lay down the following principle:

Where the damages resulting from a breach of contract are uncertain and difficult to ascertain by proof or calculation at the time of the breach, and the amount named as liquidated damages is not patently excessive, unconscionable or oppressive, and the contract distinctly sets out the fact that the intention of the parties thereto was to make the sum liquidated damages in case of breach, the courts, in such case, will allow recovery of the stipulated sum as liquidated damages.

It is not denied that where the damages are easily ascertainable and capable of exact proof or computation, and an amount has been named as liquidated damages, as in the case of interest, then the actual damages should prevail, and not the amount named as liquidated damages. But the principle first stated above will govern in this case at bar.

Council for appellant misconstrue the contract involved in

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this case. For instance, they say that according to the first charge given to the jury for appellee, Coker as surety would have been held responsible to appellee for the sum of $800 named in the bond, if the subcontractor, Hillerman, had failed to carry the mail for only one day of the whole term. This is a mistake. The contract provides for certain fines and deductions which are to be made in case of certain derelictions. Partial failure to perform the contract is provided for by fines and forfeitures. It is only in case of total failure or refusal to perform the contract, or abandonment of the same, that the full sum of $800 can be recovered.

To state the proposition in another way: The only breach of this contract was the total failure of Hillerman, the subcontractor, to carry the mail. Had he failed to carry the mail for only one day, he would, of course, have had a certain amount deducted from his pay, as provided in the subcontract, which was exactly the same in language as the contract of the United States Government with Brevard, the appellee. And if appellee had sued, in case of such small failure, for the full sum of $800, the subcontractor, or his surety, Coker, could very properly have defeated the suit, as regards recovery for the full amount, by exhibiting the contract and showing therefrom that he was only liable to pay a small fine.

Note the language of the contract: "The said party of the second part and his sureties aforesaid do jointly and severally undertake, covenant and agree and do bind themselves and each of them to and with the said party of the first part in the sum of $800, to transport the United States mail on said route, No. 26,140 from Okalona to Houston and back, six times a week, from November 1, 1900, to June 30, 1904, inclusive. . . . It is hereby further agreed that in case of failure or refusal by the party of the second part to perform the mail service herein provided for, then the sum hereinbefore stipulated shall become immediately due to the party of the first part as liquidated damages and not as a penalty, and

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Brief for appellee.

in default of payment thereof, may be recovered in an action of debt." This contract was breached the very day its performance was to begin. It was to cover a period of three years and nine months. The compensation of Hillerman, the party of the second part, was to be $550 a year. The amount named in the contract as liquidated damages was only $800. Now it cannot be denied that the appellee, Mrs. Brevard, was damaged by the breach on the very first day the contract was to begin, but there were no rules of evidence by which the damages could be approximated on that day. It might have been possible for her to have re-let the contract to some one else with very little additional expense; and, on the other hand, her expenses or damages might have been a very large amount. In fact, as regards the total of actual damages, the appellee's agent, L. E. Brevard, who personally represented the appellee throughout, testified that it was, at the time of the trial, impossible to estimate exactly the actual damages sustained by the appellee by reason of the breach. It certainly cannot be said that the amount of $800, prescribed by the contract as liquidated damages was grossly excessive, unconscionable or exorbitant, or that fraud was practiced upon the subcontractor and his sureties.

In construing the contract it will be found that ample provision was made therein for all partial derelictions and failures, and protection against complete liability to the full extent of the $800 was made for the subcontractor and sureties by different fines and forfeitures. And, this being true, the case of *Bright* v. *Rowland,* 3 How. (Miss.), 398, is not in point. However, it is of importance to note that the opinion in that case recognizes that liquidated damages can be recoverable in certain cases.

That the first instruction granted to the appellee was correct, is evident from the authorities. 1 Suth. Dam. (1882), sec. 6, p. 475 *et seq.; Dakin* v. *Williams,* 17 Wend., 447; *Crisdee* v. *Bolton,* 3 C. & P., 240.

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Opinion of the court.

The subject matter of the contract and the intention of the parties are the controlling guides in determining the meaning of the contract. If, from the nature of the agreement, it is clear that any attempt to get at the actual damages would be difficult, if not in vain, then the courts will incline to give the relief to which the parties have agreed. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the words "liquidated damages" will not prevent the court from inquiring into the actual injury sustained, and doing justice between the parties. 13 Cyc., 90; 2 Sedgw. Damages (7th ed.), 399; Pom. Eq. Jur., sec. 433; *King Iron Bridge Co.* v. *City of St. Louis,* 10 L. R. A., 829 (note); 19 Am. & Eng. Ency. Law (2d ed.), 402 *et seq.*

Lyon & Lyon, on the same side.

Damages in contemplation of law are either liquidated or unliquidated. Liquidated damages are such as have been ascertained by a judgment of court or by the specific agreement of parties.

In this case the parties had agreed beforehand what should constitute the measure of damages for a total breach of the contract; and the measure was not unconscionable or oppressive. In view of the circumstances, and especially as no fraud was practiced in procuring the appellee and other obligors to execute the contract, the case should be affirmed.

WHITFIELD, C. J., delivered the opinion of the court.

We think the court, in the light of modern authorities in this state and elsewhere, erred in construing the $800 to have been fixed as liquidated damages, and not as a penalty. See *Bright* v. *Rowland,* 3 How. (Miss.), 398. So far as the defense of drunkenness is concerned, the jury have settled that; and, there being evidence to support their finding, we would not be warranted in interfering with it.

The judgment of the court below is reversed, and the cause remanded.

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CLARK E. FREED v. AMERICAN FIRE INSURANCE COMPANY.

[43 South., 947.]

TRUSTS AND COMBINES. *Insurance. Subrogation. Laws* 1900, *p.* 125.

The subrogation of an insurance company to the right of action of the insured against a wrongdoer through whose tort the property was destroyed by fire has no relation to the business of an unlawful combination of which the company is a member, and is unaffected by Laws 1900, p. 125, avoiding all contracts made by members of such a combination for any purpose relative to the business thereof.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

The American Fire Insurance Company, the apuellee, was plaintiff in the court below, and Freed, the appellant, was defendant there. From a judgment in favor of the plaintiff the defendant appealed to the supreme court.

The plaintiff, the American Fire Insurance Company, had insured the property of one Darden, which was destroyed by fire caused by the wrongful act of defendant. The insurance contract contained a provision subrogating the insurer to the rights of the insured against persons responsible for the destruction of the property. After the insurance company had paid the claim of the assured for the loss under the policy, Darden assigned all right of action which he had against Freed for the wrongful destruction of his property. This suit was then filed by the fire insurance company against the defendant to enforce its rights under the subrogation agreement and assignment. Defendant resisted the recovery, pleading that at the time of the issuance of the policy, and execution of the assignment of the claim to plaintiff, the insurance company was a member of an illegal trust and combine. To this plea the plaintiff replied that the only business of the combine was

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to fix rates, and that the subrogation agreement was entirely independent of it. The defendant demurred to the replication, and on the court's overruling the demurrer, declined to plead further, and judgment final was rendered against him.

L. M. Gaddis, for appellant.

It is conceded by appellee's pleadings that it is a member of a combine and trust, and the solution of the issues raised by the pleadings depends, therefore, upon two questions: First, the construction by this court of the phrase, "any purpose relative to," which occurs in acts of 1900, ch. 88, sec. 3, as applied to the contract of insurance; and, as a corollary thereto, whether the subrogation condition, provided for in the standard form of policy in issue, is a part of the consideration for which the policy was issued; second, whether the matter set up as a defense by the appellee raises such a collateral issue as is not permissible in a strictly legal proceeding. Appellant contends that since the act of 1900 (Laws, p. 125), commonly known as the "Anti-trust Statute," declares that all contracts of a trust and combine, or of its members, relating to its business are void and unenforceable, it follows that the contract of insurance between appellee and Darden was illegal. The original contract of insurance being illegal, the contract of subrogation growing out of it is void and unenforceable. This court held, in *Adler* v. *Searles,* 86 Miss., 406, s.c., 38 South., 209, and in *Woodson* v. *Hopkins,* 85 Miss., 171, s.c., 37 South., 1000, that wherever, in any attempt to maintain a right of action, it is necessary to refer to an illegal transaction either executed or executory to establish that right, the recovery must fail. Now, but for this agreement for subrogation, the insurer would have been a complete stranger as to Freed, and without any action whatever against him. Consequently, in order to maintain a right of action against Freed, the appellee must resort to its illegal contract to establish its claim, and in fact does so, for in its declaration it sets out distinctly and fully

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the original contract of insurance and its assignment by Darden. The determination of the first question above stated must be resolved in favor of appellant. *Pollard* v. *Phœnix Insurance Company,* 63 Miss., 244.

On the discussion of the second question involved, namely, the matter of the collateral issue, learned counsel for the appellant, in the court below, relied upon the case of *Houck* v. *Wright,* 77 Miss., 476, s.c., 27 South., 616. The case is, however, not applicable. The contract sued on in that case was one made by the agent in his own name, the agent having assumed the payment to his principal, and having previously sold the piano insured to Wright upon his own account, and having assumed the payment of the same to his principal, Vose. It was a case in which Vose had no interest whatever, and any agreement existing between Vose and Houck did not affect the contract made by Houck with Wright. It was not necessary for Houck to resort to his agreement with Vose in order to make out his case against Wright. This transaction would have stood the test laid down by the books enabling a party to recover under the collateral contract when he could not have recovered under the original contract. It seems to be the view of appellee that simply because Darden's house was burned by fire set out from Freed's waste or dump plant, therefore Freed is under a liability to Darden or anybody else who appears and claims under him without restriction.

We do not regard the case of *Connolly* v. *Union Sewer Pipe Company,* 184 U. S., 540, as antagonistic to our view. For while it may be conceded that the language of the Illinois Act was broader than ours, in providing that it might be pleaded as a defense to any suit for the purchase price of any commodity bought from one violating the statute, nevertheless it is our view that our own statute is the same in intent. Furthermore, the court says, on p. 556 of the case cited, that had the statute been constitutional, the defendant could have

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Brief for appellee.

successfully pleaded a non-liability. The validity of our statute is not here in question.

J. W. Cutrer, for the appellee.

It is insisted that the pleas are fatally defective, because they do not aver that the subrogation agreement sued on was made for any purpose relative to the business of the alleged trust and combine stated therein. Section 3 of the act upon which appellant especially relies, is as follows: "Every contract to enter into or pursue any trust and combine, and every contract made by another with any trust and combine, or with any member of a trust and combine, for any purpose relative to the business of such trust and combine, is void, and cannot be enforced in any court." Not one of these pleas avers that the contract sued on was in any way relative to the business of the trust and combine complained of. It will be seen by reference to the whole act that there are several steps necessary to be taken by appellant before section 3 of the act can be of any avail as a matter of defense in this suit. The section must be given a reasonable interpretation, and with that in mind, it cannot be said that all contracts made by such an insurer are void, any more than it can be said that all contracts made by an insured with such an insurer are void.

The limits of lines of demarcation fixed by the statute upon and as between what contracts are void and what are not, is that such and every contract and agreement made by an insurer, a trust and combine or a member thereof, with another in a trust and combine or member thereof, shall be void and nonenforceable so far only as such contract or agreement is for a purpose relative to the business of such trust and combine. Clearly the subrogation of the insurer to the right of the insured, for a wrongful destruction of the property insured, is not any purpose relative to any trust and combine. Subrogation is a right arising out of and by operation of law, and is an incident to the contract of indemnity. It will be understood

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at the outset that appellee has been legally admitted to do business in the state in conformity to the laws thereof, and there is no question presented which might arise if a different state of facts existed.

Our contention is that the insurer having paid the loss is subrogated to the right of the insured regardless of any specific contract or agreement to that effect. The rules is thus stated by the supreme court of Missouri: "It is well settled law in this country that the insurer against fire of property which has been destroyed by fire communicated from a locomotive engine, will, upon payment for the loss, be subrogated to the extent of their payment, to the remedies of the insured as the owners of the property insured and destroyed, against the railroad company, for the loss." *Lumberman's Ins. Co.* v. *K. C., F. C. & M. R. R. Co.,* 50 S. W. Rep., 281.

In that case, the insurance company was seeking to enforce a right of action assigned to it by the insured against the railroad company, to which the insurance company had been subrogated and, said the court: "It is this right that is sought to be enforced in this action, and it follows that the right, tinctured with no wrong, must be sustained."

The following quotation is taken from Cooley's Briefs on Insurance, vol. 4, p. 389: "If the insurer has paid the loss, the fact that it might have successfully contested the claim under the policy and relieved itself from liability to the insured, does not affect its right of subrogation. The equity between the insurer and the insured is not matter with which the wrongdoer has any concern." In support of the text cited above, the following cases are cited: *U. S.* v. *Am. Tob. Co.,* 166 U. S., 468, 41 Lawyers' Ed., 1081; *Amazon Ins. Co.* v. *I. M. R. R.,* 1 Fed. Rep., 589; *Sun. Mutual Ins. Co.* v. *Miss. Val. Trans. Co.,* 17 Fed. Rep., 919; *Pease* v. *Quebec S. S. Co.,* 24 Fed. Rep., 285; *In re Harris,* 57 Fed. Rep., 243; *St. L., A. & T. R. Co.* v. *Fire Assn.,* 60 Ark., 325, 28 L. R. A., 83.

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Brief for appellee.

In the case of *Phœnix Ins. Co.* v. *Erie & Western Trans. Co.*, 117 U. S., 312, it is said (on page 321), in the opinion of the court: "From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance and is derived from the insured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name and even in a court of equity or admiralty it can only be asserted in his right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured." The court says further that the right of the assured "is not incident to the property in the thing insured, but it is only a personal right of the assured. . . . This is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action in the proportion to the sum paid by him, not only in the case of total loss, but likewise in a case of partial loss and when no interest in the property is abandoned or accrues to him." See also in same connection, *St. L., I. M. & S. Ry. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. Sup. Ct., 223, and particularly the language of the court on p. 235.

If there be any doubt as to the propositions already advanced, it is contended that the judgment of the court below was right and should be affirmed for the reasons stated in the third proposition heretofore formulated. That proposition is based upon the fact that the right of action asserted by appellee is independent of and arises from a source entirely dissevered from the insurance contract; that it is not in any way tainted because of any alleged unlawful conduct sought by the pleas to be imputed to appellee, being a right which accrued in favor

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of a third person who was in no way connected or associated with or a party to any of the facts alleged by way of defense; that such right of action is maintainable by appellee, in the right of the assured, as assignee of such independent right of action vested in and maintainable by the assured, and which depends for its successful assertion upon the proof of a commission of a tort by the appellant, an issue entirely separate from or at the most collateral only to the original contract of insurance. It is quite uncontrovertible that the right of subrogation can be asserted and maintained without proof of the existence of any illegal trust and combine, such right and a recovery based thereon in no way relate to or involve any question concerning the business of any such trust and combine. The right to recover in this instance depends upon proof that the insured lost his property by fire by the wrongful act of appellant, and that appellee indemnified the insured on account of the said loss by paying him the amount thereof. The fact that an illegal trust and combine might have existed with respect to fixing rates for insurance would not and could not effect the right of the insured to recover of the appellant for the destruction of his property, nor could it nor would it afford any matter of defense as against the insured to prevent a recovery against him for his wrongful misconduct.

The right of appellee to recover is derivative. If a good cause existed in favor of the insured; such cause acquired by the insurer would not become tainted with illegality because in some respect perchance, dissociated from the cause of action with which it became vested, it had violated the laws of the state.

It is urged upon the attention of the court with much of tedious repetition, that the statute does not close the doors of the courts against every member of a trust and combine, but that the only class of cases in which the doors are closed and relief is denied, is in respect to any contract or agreement made by any trust and combine with any member of a trust and

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Brief for appellee.

combine for any purpose relative to the business of such trust and combine. It is the enforcement of such alleged contract and agreement, of the very contract and agreement made in the manner stated by the statute, and no other, which is denied by the statute. But in all other respects, the contracts of such persons are within the protection of the law, and enforceable by the courts. All other classes of contracts are beyond the bar of the statute. *Houck* v. *Wright,* 77 Miss., 476, s.c., 27 South., 616; *Woodson* v. *Hopkins,* 85 Miss., 171, s.c., 37 South., 1000; *Adler* v. *Searles,* 86 Miss., 410, s.c., 38 South., 209; *National Distilling Company* v. *Cream City Importing Company,* 39 Am. State Rep., 902.

In the case of *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540, the appellee sued the appellant upon certain negotiable instruments executed on account of sewer pipe purchased by appellant from appellee. Appellant sought to defeat recovery on the ground that appellee was a member of a trust and combine unlawfully created contrary to the statute, known as the Sherman Anti-trust law and to the common law. A further defense was also interposed because the dealings set out in the pleadings were alleged to be contrary to the Illinois statute on the subject. It was not denied that a statute could be legally enacted broad enough to make illegal every character of unlawful conspiracy against trade and the accessories or auxilaries thereof, and also to make void every character of contracts entered into by any person or corporation offending against the terms of such a law. The United States supreme court deciding the question both upon the common law and the Sherman act, held that conceding for the purpose of that case, that the trust and combination complained of by appellant was illegal, nevertheless, the purchases by appellant had no connection with the alleged illegal combination, and, therefore, the question of the existence of such combination was entirely collateral to the right asserted by appellee against appellant; that the contract between appellee and appellant was in every sense collateral to

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the alleged illegal agreements between appellee and other corporations or associations, whereby an illegal combination was formed to fix the price for the sale of sewer pipe, and that as the action was *not to enforce the terms of such an agreement,* the existence of a combination was entirely collateral to the question of debt or liability, as in the case at bar. *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S., 540.

WHITFIELD, C. J., delivered the opinion of the court.

It is insisted by the learned counsel for the appellee that the subrogation agreement and assignment arose out of an agreement of the insured and assignor with appellee, the assignee, for no purpose relative to the business of the alleged trust and combine; and again it is insisted that the appellant committed a tort, and the right of action, *eo instante,* vested in a third person because thereof; that said right was, by the subrogation agreement sued on, transferred and assigned to appellee; that such third person was in no way connected with any of the acts or facts alleged by way of defense, and that the right of action so vested in him is maintainable by appellee as assignee of such independent right aforesaid; and that therefore the pleas are an answer to the declaration, and that Laws 1900, pp. 125–127, ch. 88, are not shown to be any bar to this suit. We cannot concur in all the criticisms made by learned counsel for appellee of the provisions of this act, but we think the first of the two propositions which we have stated above is sound. The subrogation of the insurer to the right of the insured for a wrongful destruction of the property insured can certainly not be held to be "any purpose relative to" the business of the trust of which the appellee was a conceded member. Subrogation is a right arising out of and by the operation of the law, and is an incident to the contract of indemnity. In Cooley's Briefs on Insurance, vol. 4, p. 389, it is said, citing a great number of authorities: "If the insurer has paid the loss, the fact that it might have successfully con-

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tested the claim under the policy, and relieved itself from liability to the insured, does not affect its right of subrogation. The equity between the insurer and the insured is not matter with which the wrongdoer has any concern." In Sheldon on Subrogation, sec. 223, it is said: "This subrogation of the insurers to the remedy against the wrongdoer who has caused the loss which the insurers have stood is only to the remedies and rights of action which were vested in the insured, or which the insured might have succeeded in obtaining from the party at fault, subject to all the liabilities and duties which rested on the insured, even in favor of third parties. It is not an independent right of action in the insurers themselves, and not subject to any estoppel existing against the insurers in their own right. The insurers succeed merely to the means of redress which were possessed by the party whom they have indemnified against the party whose wrongful act caused the loss." In Cooley's Briefs on Insurance, vol. 4, p. 3898, it is said: "Though the right of subrogation is in some cases based on the clause in the policy providing for the assignment to the insurer of the cause of action against the wrongdoer (*Egan* v. *British & Foreign Ins. Co.*, 61 N. E., 1081), it is generally held that an assignment is not necessary to support the right" —citing a large number of cases. And again it is laid down in Cooley's Briefs on Insurance, vol. 4, pp. 3895, 3896, that "this right of subrogation does not depend on the presence of a special clause in the policy conferring the right, nor is the insurer's right of subrogation affected by the failure of the insurer to comply with the laws regulating insurance companies" —citing a number of authorities. And finally it is said in *Phœnix Ins. Co.* v. *Erie & Western Transportation Co.*, 117 U. S., 312, at page 321, 6 Sup. Ct., 750, at page 753, 29 L. Ed., 873, that "from the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the insured the amount of the indemnity agreed on between them, is entitled by way of salvage to the benefit of anything that may be

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received, either from the remnants of the goods, or from damages paid by third persons for the loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the insured alone, and can only be enforced in the right of the latter. In a court of common law it can only be asserted in his name; and even in a court of equity or admiralty it can only be asserted in his right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured." From these authorities it seems to be clear that on the facts of this case the appellee was entitled to enforce against the appellant the right which the insured had against the appellant, having paid the loss to the insured. What the insurer has is just precisely the right of action which the insured had, growing out of the appellant's wrongdoing. The insurer's right to sue at all is wholly derivative, and it is impossible to see, in this view of the matter, how this right has anything to do with, or can be said to have any relation to the business of the trust or combine.

But, again, it is earnestly insisted that the right of action asserted by the appellee, the insurer, is independent of, and arises from a source entirely distinct from, the insurance contract. It is a right which accrued in favor of a third person, the insured, who was in no way connected with the trust or combine. Such right of action is maintainable by the insurer only in the right of the assured, and it can only be successfully maintained by proof of the commission of a tort by the appellant, which certainly presents an issue entirely collateral to the original contract of insurance. The insurer maintains this right of the assured, if at all, quite independently of the stipulation for subrogation in the policy of insurance. He succeeds, if he does succeed, in the suit against the appellant, not because of the form in which he sues as assignee under the subrogation clause of the policy; but he has been substituted by equitable principles to the right of the insured himself to re-

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cover against the appellant, and in this view it certainly cannot be claimed that that right of action is anything other than wholly collateral to the contract of insurance. The case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 22 Sup. Ct., 431, 46 L. Ed., 679, is claimed to be decisive in favor of appellee on this point. The supreme court in that case, after holding that, even if the combination was illegal, nevertheless the purchases by appellant had no connection with the alleged illegal combination, and therefore that the question of the existence of such combination was entirely collateral to the right asserted by the appellee against the appellant, and that the contract between the appellee and the appellant was in every sense collateral to the alleged illegal agreement of appellee and other associations and corporations, whereby an illegal combination was formed to fix the price for the sale of sewer pipe, and that as the action was not to enforce the terms of such an agreement, the existence of a combination was entirely collateral to the question of debt or liability on the part of the purchaser of sewer pipe to the seller thereof.

We, however, prefer not to rest our judgment on this second ground insisted on by learned counsel for appellee in this case, but rather upon the ground first above stated. The language of our act of 1900 is exceedingly broad, and we do not find it necessary in this case to affirm the judgment of the court below on the ground secondly argued under the authority of *Connolly* v. *Union Sewer Pipe Co.*, to-wit, that the contract of insurance in this case is collateral to the trust agreement which relates only to the fixing of rates. The United States supreme court, in a very recent case, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U. S. 390, said, in a case where the city of Atlanta sued for threefold damages to business or property authorized by Anti-Trust Act July 2, 1890, ch. 647, sec. 7, 26 Stat., 209 [U. S. Comp. St. 1901, p. 3202], in a case of violation of that act, that "the fact that the sale of the pipe was not so connected in its terms with the unlawful combination as to

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Concurring opinion.

be unlawful (*Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 540, 22 Sup. Ct., 431, 46 L. Ed., 679), in no way contradicted the proposition that the motives and inducements to make it were so affected by the combination as to constitute a wrong," and added that, "in most cases where the result complained of as springing from a tort is a contract, the contract is lawful and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud." We cite this by way of caution merely, and out of the same abundant caution prefer to rest our judgment in this case on the ground first hereinbefore set forth.

Affirmed.

MAYES, J., delivered the following concurring opinion:

This controversy arose under the law as it stood by virtue of the act of 1900, Laws 1900, p. 125, ch. 88. I concur in the opinion of the majority only to the extent that it reaches the result that appellees had the right to recover under the law as it was when this liability was incurred. I concur in the opinion in no other respect.

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Statement of the case.

THERESA J. STEWART ET AL. v. RICHARD H. FORMAN.

[43 South., 67.]

LIMITATIONS. *Acknowledgment of debt. Code* 1892, § 2757. *Code* 1906, § 3118.

A deed of conveyance which provides that in consideration thereof the grantee is to credit the grantor's indebtedness to him with a certain sum and that such conveyance shall not impair the lien of a fully identified trust deed as a security for whatsoever balance the grantor owed is, under Code 1892, § 2757, a sufficient acknowledgment, in writing, signed by the party chargeable thereby, to save the bar of the statute of limitations, in a proceeding to foreclose the trust deed,—the amount acknowledged to be due being readily ascertainable by applying the credit on the indebtedness.

FROM the chancery court of Jefferson county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Mrs. Stewart and another, appellants, were complainants in the court below; the appellee, Forman, was defendant there. From a decree sustaining defendant's demurrer to the bill and dismissing the same, complainants appealed to the supreme court.

On December 24, 1892, the appellee, Forman, being indebted to Stewart Brothers & Company, a mercantile copartnership, in the sum of $3,000, executed his promissory note to their order for that amount, payable on December 24, 1893, and, to secure the debt evidenced by the note, executed a trust-deed conveying along with other property an interest in land known as the Dent plantation. This trust-deed was duly recorded upon the county records in Deed Book 3-A, p. 362. On November 16, 1899, the debt being still unpaid and the bar of limitation about to intervene, Forman, at the request of Stewart Brothers & Company, executed a formal renewal of the note and trust-deed, signed and acknowledged by him before

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Statement of the case.

a noatry public. The renewal stated that the appellee, Forman, "acknowledged the correctness of the debt secured by the trust-deed of record in Deed Book 3-A, p. 362," but did not specify when the indebtedness should be paid by him. Hence it will be seen that the six-year statute of limitation began to run forthwith against the renewal, from the new date of November 16, 1899. This renewal was duly recorded in Deed Book 3-I, p. 711. On December 11, 1902, the debt being still unpaid, Forman, who desired to dispose of certain property in the town of Rodney, included in the trust-deed, executed a warranty deed to Stewart Brothers & Company, incorporating in this deed language which was claimed by appellants to be an acknowledgment in writing of the existing debt secured by the note and trust-deed aforesaid, and which is as follows:

"Whereas heretofore I executed to Stewart Brothers & Company a lien upon the property hereinafter described, together with other real estate, to secure an indebtedness due to them by me; and whereas said indebtedness is still largely unpaid, and I, R. H. Forman, have agreed with said Stewart Brothers & Company to convey to them the property herein described, and in consideration of such conveyance they are to credit me on my indebtedness to them with the sum of $1,270. . . . (Here follows the conveyance proper.) . . . But it is expressly understood and agreed that this conveyance shall in no wise affect or impair the lien of said Stewart Brothers & Company upon the interest I own in the Dent plantation, but said lien, as shown in Book 3-A, p. 362, and Book 3-I, p. 711, of the record of deeds of Jefferson county, shall remain unimpaired as security for the balance I owe them."

On April 24, 1906, twelve years and four months after the maturity of the note of appellee to Stewart Brothers & Company, six years and five months after the renewal of November 16, 1899, and three years and four months after the execution of the warranty deed, the appellants filed a bill in chancery against the appellee alleging the above facts. The bill further

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Brief for appellant.

alleged that the amount due was not incorporated in the renewal for want of proper data in the possession of the attorneys drawing the instrument at the time, and praying for an accounting to ascertain the balance due, and an order for same to be paid to complainants, or that the property covered by the trust-deed be sold under order of court and the proceeds applied, in so far as might be necessary, to the payment of the indebtedness. Defendant filed a short answer denying indebtedness on the ground that the debt was barred by statute of limitations of six years, but subsequently by leave of court withdrew his answer and filed a demurrer based on the contention that the recitals in the warranty deed of December 11, 1902, relied on by complainants as constituting a renewal of the debt, were insufficient to take the case out of the statute of limitations. The demurrer was sustained, and as complainants declined to amend their bill, the suit was dismissed.

Code 1892, § 2757, the statute referred to in the opinion, is as follows:

"In actions founded upon any contract, an acknowledgment or promise shall not be evidence of a new or continuing contract whereby to take any case out of the operation of the provisions of this chapter ("Limitation of Actions") or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby."

E. S. & J. T. & H. W. M. Drake, for appellant.

The language of the deed of December 11, 1902, is ample to establish the acknowledgment of debt required by Code 1892, § 2757. This statute, in the Code chapter on limitation of actions, provides that the limitation or bar shall not cease "unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby." Certainly the recitals in the deed in reference to the debt constitute a distinct and formal acknowledgment of the

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debt sued on. The debt itself is unequivocably identified, and contained in a writing signed by the party chargeable thereby. Even a cursory reading of the deed shows that the language was meant to be an acknowledgment of a balance due upon the indebtedness due by the appellee, which is the debt sued on.

Notice the recitals: "Whereas heretofore I executed to Stewart Brothers & Company a lien upon the property hereinafter described (together with other real estate) to secure an indebtedness due them by me, and whereas said instrument is still largely unpaid, and I, R. H. Forman, have agreed with said Stewart Brothers & Company to convey to them the property herein described, and in consideration of said conveyance they are to credit me on my indebtedness to them with the sum of twelve hundred and seventy dollars. . . . But it is expressly understood and agreed that this conveyance shall in no wise affect or impair the lien of said Stewart Brothers & Company upon the interest I own in the Dent plantation, but said lien as shown in Book 3-A, p. 362, and Book 3-I, p. 711, of the record of deeds of Jefferson county shall remain unimpaired as security for the balance I owe them."

It is difficult to see how a more formal acknowledgment of the existence of debt could be made, or how the debt itself could be more thoroughly identified or more explicitly designated.

It was contended by appellee in the lower court that the exact balance owing at the time was not stated in the renewal. This court, however, has held that this is not necessary; for, where the debt is sufficiently identified, the amount of indebtedness need not be stated in the writing. *Hart* v. *Boyt,* 54 Miss., 547; *Bowmar* v. *Peine,* 64 Miss., 99, s.c., 8 South., 166; *Heflin* v. *Kinard,* 67 Miss., 522, s.c., 7 South., 493.

In the case of *Hart* v. *Boyt,* above cited, the writing was upon the back of a mortgage securing the debt, and was in the following words, "We hereby agree and promise to renew the note for which this mortgage is given and to give a mortgage whenever the exact amount due on said note is ascertained."

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It was contended as a defense of nonpayment that the amount was not stated but was expressly left uncertain. This court held that it was not essential for the exact amount to be specified in the writing, that it was rarely ever so specified, and that the amount due is ordinarily a mere matter of calculation.

In the case of *Bowmar* v. *Peine,* 64 Miss., 99, s.c., 8 South., 166, no amount was specified in the renewal, and it was strongly contended that this was insufficient, but this court ignored such contention and held the renewal valid.

In *Heflin* v. *Kinard,* 67 Miss., 522, s.c., 7 South., 493, the acknowledgment of indebtedness relied on was contained in a letter to the payee, which letter had been lost, but which by secondary evidence was shown to be about as follows: "Credit this on my note in the county treasury. I will be down soon to pay the balance." It will be seen at a glance that this renewal did not absolutely identify the debt. In fact it would appear from close reading of the case that parol evidence was admitted to show that the maker had but one note in the county treasury. Now in the case at bar the debt is identified beyond question by a reference to a trust-deed which secures but one debt, to-wit, a promissory note; and this identification is contained in the writing itself.

While the case of *Heflin* v. *Kinard, supra,* seems to be the latest reported case wherein the point here in issue was directly passed upon by this court, yet the two cases of *Yarborough* v. *Gilland,* 77 Miss., 139, s.c., 24 South., 170, and *Brewing Co.* v. *Hendricks,* 77 Miss., 491, s.c., 27 South., 526, uphold the general doctrine announced in the three above cases. And we also call attention to the fact that the case of *Allen* v. *Hillman,* 69 Miss., 225, s.c., 13 South., 871, cited by opposing counsel, shows that the writings relied upon there were not sufficiently precise either as to the debt itself or as to the amount, and the writings were letters of apology for nonpayment, differing materially in character and contents from the recitals of the deed of Forman, the appellee.

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Brief for appellant.

We have above referred to cases of our own court. We also call attention to cases of other courts upholding our contentions, to-wit: *Bank* v. *Woodman,* 93 Ia., 668; *Hazlebaker* v. *Reeves,* 12 Pa. St., 264; *Stoner* v. *Devilbiss,* 70 Md., 144; *Schmidt* v. *Pfau,* 114 Ill., 494; *Conway* v. *Reyburn,* 22 Ark., 290; *Farrell* v. *Palmer,* 36 Cal., 187; *Davis* v. *Herring,* 6 Mo., 21; *Kittridge* v. *Brown,* 9 N. H., 379; *Hale* v. *Hale,* 4 Humph. (Tenn.), 184; *Abraham* v. *Swan,* 18 W. Va., 274; *Bell* v. *Crawford,* 8 Grat. (Va.), 177. And see also, as text-book authority, Wood on Limitation, secs. 68, 87, 88.

We would call the court's attention to the statement in the bill that the amount was not stated for the reason that neither the appellee, Forman, nor the appellant's attorney who negotiated the deal, knew what was the exact amount of indebtedness, that the appellee agreed to submit a statement of the credits claimed, which he afterward did in his own handwriting. We of course realize that this of itself would not take the case from out the operation of the statute of limitation, but we submit that it is absolutely conclusive as to the intention of the parties in the execution of the writing sued on, namely, to renew the debt, to take a new start upon an indebtedness the amount of which should be newly ascertained.

It is important to note that under our statute, Code 1892, § 2757, an acknowledgment in writing is sufficient of itself to stop the running of the statute. In many other states the language of the statutes calls for a new promise and makes no mention of an acknowledgment. Yet in the great majority of these states a new promise is inferred from an acknowledgment. Alabama is the only state of which we have knowledge where a new promise will not be inferred or implied from an acknowledgment. For such reasons our state cannot take the decisions of Alabama as authoritative on the point here in issue.

In conclusion, we contend that the appellee's deed of December 11, 1902, shows upon its face that it is not merely a deed but also an acknowledgment of indebtedness for the pur-

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pose of removing the bar of the statute. The deed was complete without such recitals as to the indebtedness. The concluding clause of the deed, in reference to the lien on the Dent plantation, was added evidently, (1) for the purpose of acknowledging beyond cavil that after the application of the payment there still existed a balance upon the debt referred to; (2) for the further purpose of retaining in force, that is, renewing, the lien by which this balance was secured.

The cases cited by opposing counsel do not sustain his contention, hence, under the above authorities we have cited, the decree of the lower court should be reversed and the case be remanded.

J. A. Ramsay, for appellee.

The contention of appellants is that the appellee's deed of December 11, 1902, to Stewart Brothers & Company contains a new promise or acknowledgment sufficient to prevent the bar of limitation. But such contention is not tenable. The deed recites that Stewart Brothers & Company are to credit appellee on his indebtedness to them, in a certain amount. A part payment will certainly not be considered as removing the bar of limitation. *David* v. *Harrison,* 33 Miss., 41; *Perry* v. *Ellis,* 62 Miss., 711; Code 1892, § 2757.

An acknowledgment or new promise in writing, if sought to be admissible as evidence of a new or continuing contract sufficient to deprive the debtor of the benefit of the statute, must be one sufficient to maintain a suit upon. *Fleming* v. *Fleming,* 33 S. C., 505; *McCormick* v. *Brown,* 36 Cal., 180.

Neither the word "acknowledge" or the word "promise" is used in appellee's deed, and the court will notice that the references in the deed are to the *lien,* no promise to pay being therein intimated. A promise or acknowledgment relied on to take a case out of the statute of limitations must be a direct, distinct, unqualified and unconditional admission of the debt which the debtor is liable and willing to pay. *Pierce* v. *Merrill,* 79 Am.

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St. Rep., 63. See also *Connecticut Trust, etc., Co.* v. *Wead,* 172 N. Y., 497; *Krebs* v. *Olmstead,* 137 Mass., 504.

It is not the acknowledgment which renews or revives the debt. The determining question must be whether there has been a new promise within six years from maturity of the prior debt.

Recitals in a bill of complaint as to past conversations and other matters of incompetent evidence will not check the statute of repose. *Fletcher* v. *Gillan,* 62 Miss., 8; *Marcum* v. *Marshall,* 129 Penn. St., 506.

As there was no acknowledgment of indebtedness in the deed within the meaning of the statute the action of the lower court was correct, and the case should be affirmed. *Hart* v. *Boyt,* 54 Miss., 547; *Allen* v. *Hillman,* 69 Miss., 225, s.c., 13 South., 871; *Braithwaite* v. *Harvey,* 43 Am. St. Rep., 625.

WHITFIELD, C. J., delivered the opinion of the court. We think the recitals in the deed of December 11, 1902, quite sufficient to take the case out of the statute of limitations. It will be observed that the statute (§ 2757, Code 1892) uses the language in the alternative, "such acknowledgment or promise." So far as the amount is concerned, that is a mere matter of calculation, made certain by the amount of the debt and the amount of the credit. The debt is distinctly identified. See *Heflin* v. *Kinard,* 67 Miss., 522, 7 South., 493, and *Hart* v. *Boyt,* 54 Miss. 547.

The decree is reversed, the demurrer overruled, and the cause remanded, with leave to answer within thirty days from filing of mandate in the court below.

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Statement of the case.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. EPSEY JENNINGS ET AL.

[43 South., 469.]

1. EMINENT DOMAIN. *Railroad construction. Damages.*

In estimating damages to result from the construction of a railroad through a farm, it is improper to consider as an element of damage, either:—

(*a*) That laborers on the farm would likely stop work and look at passing trains; or

(*b*) That the mules in use on the farm would likely run away as trains approached; or

(*c*) That deleterious grasses might be scattered over the land; or

(*d*) That live stock getting upon the track would likely be killed by the trains.

2. SAME. *Excessive award. Case.*

Facts of the case considered and verdict adjudged excessive.

FROM the circuit court of, second district, Tallahatchie County.

HON. SAMUEL C. COOK, Judge.

The Yazoo & Mississippi Valley Railroad Company, the appellant, was the applicant in eminent domain proceedings against Epsey Jennings and another, the appellees. Both parties appealed from the judgment of the special eminent domain court to the circuit court.

On the trial in the circuit court there was evidence for the landowners to the effect that while the actual value of the land to be expropriated was from $100 to $125 an acre, the consequential damages were very considerable on account of the peculiar lay of the land and the manner in which it would be traversed by the railroad track. Appellees claimed damages because of the probability that their livestock would be killed

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by railroad trains, because of interference with drainage likely to result from insufficient culverts, the scattering of noxious grasses, and because the passage of the trains would make mules run away and disturb laborers, causing them to stop work and look at passing trains. The opinion further states the facts.

The jury in the circuit court awarded a verdict for the appellees, jointly, in the sum of $10,000 for the taking of the lands by the railroad company; and from a judgment based thereon the railroad company appealed to the supreme court.

Mayes & Longstreet, for appellant.

The verdict of the jury of $10,000 in favor of the two landowners as compensation for the appellant's taking sixteen and a fraction acres of land is grossly excessive in any view of the case. We think it will not be denied that the actual value of the land to be taken, as established by the overwhelming preponderance of the evidence, is not less than $75, nor over $125, per acre. Therefore, at the minimum valuation the actual value of the land would not be more than $1,237.50, and, at the maximum value, $2,062.50. It therefore conclusively appears that the jury could only have assessed the damage at this latter figure under the evidence for the actual taking, while they assessed an amount in the neighborhood of $8,000 for consequential damages.

One witness for appellees, W. H. Sumner, testifies that there were only seventy-five acres of first-class land concerned, and about one-third of the balance was third-class land. It was shown indisputably that the value of the whole property of appellees ranges from $45 to $125 per acre. It was alleged by several other witnesses for appellees, that the damage to the land was one-third the value of the whole property of the appellees; but on cross-examination it was further shown by these same witnesses that many improper elements of damage entered into their estimates. For instance, as estimates of damage, two witnesses for appellees, R. D. Murphree and

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J. B. Sumner, set forth the probabilities that livestock of appellees will be killed by the trains of appellant; that drainage of the rest of appellees' lands will be interfered with; that proper ditches will not be kept open; that labor would be disturbed, grass scattered, and great inconvenience result from appellees having to cross and recross the railroad track. We hardly think it necessary to discuss these elements of damage. No witness should be allowed to estimate that the value of a whole farm of about 300 acres, as is appellees', will be destroyed one-third of its market value because the negroes working in the field may stop in future years to look at passing trains, or that stock will get killed, or that, because of improper attention on the part of the laborers, the appellees' mules may run away in fright at the approach of trains, and get hurt.

The law is that damages for expropriation are estimated on the theory that proper and legal construction will be made, and proper provision be maintained, for drainage. If there should be failure of the railroad company's part as to this, the land owner will have, in every instance, his recourse in the courts. Not only will he have recourse, but the fact that such is the law is conclusive against the control of such considerations in the original condemnation proceedings. *Railroad Company* v. *Davis,* 73 Miss., 678, s.c., 19 South., 487; *Railroad Company* v. *Harlin,* 36 L. R. A. (Neb.), 417. The same rule applies as to the other elements of damage in the estimates of the appellees' witnesses.

While it is right that a landowner should have compensation for property taken, and also that actual damages should be augmented reasonably by further damages allowed because interference with the use or consequent impairment of the value of adjoining lands, we submit that it is beyond the bounds of reason to say that sixteen and a fraction acres out of a tract of three hundred acres will destroy the value of the whole remaining tract to the extent of five or six times the actual damage. The state constitution contemplates that a

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landowner shall be compensated reasonably for consequential damages, whether his land be actually taken or not, but the decisions of this court have limited such award to the actual value of the land expropriated and to such consequential damages as are done to the other land as a tract, consequent to the taking.

If verdicts like the one shown in this record shall be allowed to stand, based upon evidence as above shown, the point will soon be reached where the building of new lines will be attended with such enormous expense as practically to prohibit contemplation of any new lines.

Harris & Powell, for appellees.

It is not disputed in this case that the land of appellees, through which the railroad company seeks to condemn a right of way, is fresh, alluvial land, and very valuable; that the whole tract of appellees embraces over three hundred acres lying between two bayous, the tract being in the shape of a narrow strip a quarter of a mile wide, east and west, and being a mile and a quarter long, north and south. It is further undisputed that all of the tract is not of uniform value, the land through which the appellant seeks to condemn its way being the most valuable part. And it is undisputed that the slope and drainage of the land is from the east, while the line of the proposed railway is north and south, thus certainly affecting the drainage.

The court does not set aside a verdict of a jury on the mere ground that it is large or small. The jury's verdict in every case is beyond the control of the court in the absence of any error of law, where there is evidence to support the same. And in this case there is ample evidence to support the jury's finding in favor of appellees for $10,000. *Levee Commissioners* v. *Lee,* 85 Miss., 508, s.c., 37 South., 747.

There were six witnesses for the railroad company in the court below, two of whom estimated the damage to be

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Brief for appellees.

$6,000, while a third placed his estimate at $5,000. The appellees introduced ten witnesses, eight of whom valued the land at $100 per acre, or, in other words, at $30,000 for the whole tract. Two of appellees' witnesses, J. B. Sumner and J. S. Brougher, valued the land at $125 per acre, making the value of the whole tract of land owned by appellees to be $37,500. None of the witnesses for appellees placed the damage from the expropriation at less than one-third of the total value of the whole tract. Some of the witnesses placed the damage at one-half. Six witnesses placed the damage at $15,000, and two at $11,692. The jury seem to have taken the golden mean in the case.

While it is true that, on cross-examination, some of the appellees' witnesses stated certain elements of damage which might not be legitimately considered, yet these elements were excluded by the instructions given to the jury.

It is well settled that whatever tends to lessen the value of remaining land is a proper element of damage, and a matter for the jury's consideration, in eminent domain proceedings. Whether the damage be great or small, the landowner is entitled to compensation in due degree, under the state constitution. And the doctrine of *de minimis non curat lex* has no application. Whatever arises in the way of damage from the proper construction of a railroad which diminishes the value of the remaining land, may be taken into consideration. *St. Louis* v. *Teters,* 68 Ill., 144; *Omaha Southern R. R.* v. *Todd,* 39 Neb., 818; *Freemont R. R. Co.* v. *Bates,* 40 Neb., 381; *Lafley* v. *Chicago, etc., R. R. Co.,* 33 Fed. Rep., 415; *Missouri R. R. Company* v. *Harris,* 10 Kas., 439.

The law jealously guards the rights of a citizen whose property is being taken against his will, and the jury is not to be confined, in awarding compensation, to what the railroad company may actually do for the time being in the premises, but must take into consideration what it would probably do in the operation of its road; and if the rights of the railroad, duly

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exercised, would tend to diminish the value of the remaining land, the landowner must get his compensation in the condemnation proceedings, or he cannot get it at all. It is not necessary to show that the railroad is actually going to make excavations on the right of way, or to allow water to stand in these excavations when made, but the question is, has it the right to make these excavations, and, if so, would this tend to diminish the value of the remaining land? The railroad company has the right to do it, and it is likely to do it, and if this would affect the value of the land remaining to the landowner he is entitled to compensation therefor, and he must get it in the eminent domain proceedings, as he will not be permitted to get it in the future elsewhere.

Counsel for the appellant make an earnest appeal to the court to set aside the verdict of the jury, on some idea that the jury may have been misled by the different elements of damage shown in evidence. But the jury could not have been so misled, as the instructions granted to each side were correct enunciations of law, and were presumably followed by the jury.

Argued orally by *J. C. Longstreet,* for appellant, and *J. B. Harris,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

There is no merit in any of the contentions of the appellant, except the one which asserts that the verdict is excessive. The case is one which has troubled us very greatly in arriving at a satisfactory conclusion. One witness, W. H. Sumner, testifies that there were only seventy-five acres of first-class land in the tract, and about one-third of the balance, as he puts it, was third-class land; and he was a witness for the defendant. The value of the place ranges from $45 to $125 an acre. Several witnesses for the defendant say that the damage to the land was one-third of the whole value of the place, and some wit-

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nesses say that it was one-half the value of the place. One witness says it was from thirty to forty per cent of the value of the whole place. But on cross-examination it very clearly appears that many improper elements of damage were used by these witnesses as the basis of their judgment. Some of these elements of damage were that the laborers would stop to look at the trains, that the mules would run away, that livestock would be killed in the future on the track, and that grasses would be scattered over the farm, etc. We have done the best we possibly can with the troublesome record, and we think that $6,800 is the utmost limit that can be allowed to stand in this cause, and the judgment can only stand for that amount because of the peculiar lay of this land, and of the singular fact that the tract is only about a quarter of a mile wide, and yet a mile and a quarter in length, and that the railroad company runs through its length one and one-quarter miles, and really takes the heart of the best land on the place; and this amount is reached by allowing $100 per acre for seventeen acres, and three times that sum according to such evidence.

If the appellees will remit down to $6,800, the judgment will stand; otherwise, the judgment will be reversed, and the cause remanded for a new trial.

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Statement of the case.

HENRY HAINES ET AL. v. CALEB HAINES ET AL.

[43 South., 465.]

MARRIAGE. *Slaves. Laws* 1865, *p.* 82, *ch.* 4; *Constitution* 1869, *art.* 12, *sec.* 22. *Inheritance.*

Where a negro man and woman, who had lived together in pursuance of a slave marriage until their emancipation, continued to cohabit and hold themselves out to the world as husband and wife after the adoption of Laws 1865, p. 82, ch. 4 and Constitution 1869, art. 12, sec. 22, providing that all persons who had not been married but were then living together as husband and wife should be held to be lawfully married, the husband could not "off with the old love and on with the new" at pleasure, and his children by the wife inherited his property to the exclusion of the descendants of the mistress.

FROM the chancery court of, second district, Coahoma county.

HON. PERCY BELL, Chancellor.

Caleb Haines and others, appellees, were complainants in the court below; Henry Haines and others, the appellants, were defendants there. From a decree in favor of the complainants, the defendants appealed to the supreme court.

The object of the bill was to cancel an asserted title to certain property described in the bill, complainants claiming title as heirs of one Caleb Haines, deceased, their father, and alleging that their mother, Lucy Haines, was the lawful wife of said Caleb Haines, deceased. Henry Haines and others, children of the elder Caleb Haines by Eliza Haines, defendants, claimed that Eliza was the lawful wife of Caleb. Caleb, Eliza, and Lucy were all negro slaves belonging to the same master before the Civil War, and the only issue in this case was one of fact. Which of the two women, Eliza or Lucy, was the lawful wife of Caleb Haines, deceased, and which set of children inherit his property? Before the war Eliza had been given to Caleb

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Statement of the case.

as his wife, and they had contracted what is called a "slave marriage," an invalid but sincere ceremony, while Lucy, who was Eliza's younger sister, had contracted a slave marriage with one Harrison, whom she afterwards left and went to live with Caleb and Eliza. From the evidence it appeared that Caleb was living and cohabiting with both women during the war; that some time after 1870 Eliza left Caleb on account of his cruel treatment of her, and went to live with other men, afterwards removing to Texas, and never returning to Caleb; that after Eliza's departure Caleb claimed Lucy as his wife, and lived with her as such until her death in 1904. The evidence is conflicting as to which of the two women with whom he was living Caleb claimed as his wife at the time of emancipation, and which he recognized as his wife at the time of the passage of the act of 1865, and the adoption of the constitution of 1869.

The constitution section is as follows:—"All persons who have not been married, but are now living together, cohabiting as husband and wife, shall be taken and held for all purposes in law as married, and their children, whether born before or after the ratification of this constitution, shall be legitimate." Const. 1869, art. 12, sec. 22. The act of 1865, Laws 1865, p. 82, sec. 3, is quite to the same effect. The chancellor found that Lucy was the lawful wife of Caleb, and her children his lawful heirs, and that the children of Eliza, who had been put aside for Lucy, were not entitled to inherit, and decreed for complainants.

Frank Johnston, J. A. Glover, and *D. A. Scott,* for appellants.

J. W. Cutrer, and *Harris & Powell,* for appellees.

Argued orally by *Frank Johnston,* and *J. A. Glover,* for appellants, and by *J. B. Harris,* for appellee.

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court.

We find ourselves after most mature consideration of the evidence in this cause, unable to escape the conclusion that the chancellor has manifestly erred in his finding. It is not the number of witnesses which determines the status of the case, but the quality of the testimony; and viewed in this light, with especial reference to the testimony of Col. Russell, we think it is clear that Eliza was the wife and Lucy the mistress of Caleb Haines. The conduct of the parties, Caleb, Eliza, and Lucy, at the period of time from 1865 to 1870, is the determining feature. The act of 1865 and the constitution of 1869 fixed the law governing in that period; and, applying that law to the conduct of Caleb, it is perfectly clear that he was living with Eliza as his wife at the time the act was passed and at the time the constitutional ordinance was adopted. Holding her out through all this period as his wife, recognizing her in every way as his wife, her children as his children by her as his wife, and the reputation in the community where the three lived during that period from 1865 to 1870 being that Eliza was the wife and Lucy the mistress, clearly Eliza was the wife. So far as a slave marriage is concerned, it was clearly proven that there was a slave marriage as to each of these women. It is shown that Lucy had a slave marriage with Harrison in Alabama, by whom she had two or three children; but the crucial test is: Who was living with Caleb as his wife at the time of the passage of the act of 1865 and the adoption of the constitution of 1869? Who, during that period, was held out to the world as his wife, recognized as his wife, cohabited with as his wife? There can be but one satisfactory answer to that question on this testimony, and that answer is that Eliza was his wife. It was not for Caleb, who had taken Eliza "for better or for worse" years and years before the act of 1865 was passed, who had children by her before that time, and some up to about 1870, and who continued to recognize her as his wife until the early '70's, or,

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as George Ragsdale puts it (perhaps the most intelligent negro in the case), late in 1869 or early in 1870, because Lucy was young and Eliza had grown old, to "off with the old love and on with the new" in any such fashion as the complainants would have the court hold. If Eliza had been his wife through all the years up to 1865, and was by him held out as his wife to the world, and the mother of his children in the period between 1865 and 1870, it is utterly immaterial whether thereafter she proved a virtuous or unvirtuous woman. The fact is what the court must find—the fact of whether she had been legally recognized as Caleb's wife under the act of 1865 and the constitution of 1869. That fact once established, Caleb had no power of selecting Lucy as his wife, and turning the woman who had been the mother of his children in all his early struggles adrift. The legal inquiry is simply whether Caleb was living with Eliza as his wife, held out to the world as his wife after the passage of the act of 1865 and the constitution of 1869, or not, and we think the evidence answers this question in the affirmative by a clear preponderance of the testimony. The law married them if the facts were so, and no selection Caleb from motives of passion might subsequently have made can alter the fact that Eliza was his wife.

The decree is reversed, and the cause remanded for decree in accordance with this opinion.

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Statement of the case.

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FLAVIUS BELL *v.* STATE OF MISSISSIPPI.

[43 South., 84.]

1. CRIMINAL LAW AND PROCEDURE. *Evidence. Memorandum at preliminary trial.*

Where the conservator of the peace, before whom a defendant charged with crime had a preliminary trial, made at the time a memorandum of the evidence taken on that trial which he knows to be correct, though not signed by him nor certified as a part of the record, the state may have him testify from the same touching the testimony then delivered by a defendant's witness in order to discredit her, although he have no independent recollection of what she swore before him.

2. WITNESSES. *Credibility. Falsus in uno. Trial. Instructions. Credibility of witnesses.*

An instruction that, if witness has sworn falsely to any material matter, the jury may disregard his testimony, is erroneous for failure to state that the false swearing must have been willful.

3. HOMICIDE. *Assault with intent to kill. Instructions.*

Where, on a trial for assault with intent to kill, the defense was that the shooting was accidental, and the facts were shown by eyewitnesses, an instruction that if accused deliberately raised a loaded gun and fired it at the prosecutor only a few feet away, and shot him, inflicting a wound, the law presumed that accused intended to kill the prosecutor unless the contrary appeared, was erroneous for failing to include the idea that the shooting must be believed to have been by design, and not accidental.

FROM the circuit court of, first district, Panola county.

HON. JAMES B. BOOTHE, Judge.

Bell, the appellant, a negro, was indicted and tried for assault and battery with intent to murder another negro, one Applewhite; was convicted and sentenced to the penitentiary for five years, and appealed to the supreme court.

The defendant, Bell, was in the house of a negro woman, Lula Ford, and was handling a shotgun when Applewhite

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Statement of the case.

came to the house to get a bucket which he had shortly before left in the Ford kitchen. As he was entering the kitchen he was shot by defendant; the evidence sharply conflicting as to whether the shooting was intentional or accidental; according to the evidence offered by the state, the defendant was cautioned by Applewhite, about handling the gun carelessly, whereupon he threw his gun to his shoulder, and without provocation aimed and fired at Applewhite, only a few feet away; but according to the evidence offered by defendant, chiefly the testimony of the woman, Lula Ford, an eyewitness, the shooting was accidental. Defendant himself did not testify. To impeach the testimony of the woman the state in rebuttal introduced one Taylor, the justice of the peace before whom the preliminary trial of the defendant was had, and before whom the woman had testified. This witness, Taylor, testified that while he recollected that the woman, Lula Ford, testified as a witness at the preliminary trial he had no independent recollection of what she had testified. Over the objection of defendant the court below permitted the witness, the justice of the peace, to refer to a written memorandum of the evidence made by him at the preliminary trial, but not signed nor certified by him to the circuit court as part of the record, and to testify solely from such memorandum that Lula Ford testified in the committing court before him that defendant purposely shot Applewhite. Before so testifying, however, the witness admitted, in response to inquiries of defendant's counsel, that the memorandum did not refresh his memory as to what the woman stated on the preliminary trial, and that he did not know whether or not the memorandum contained all of her testimony on that trial. The first and second instructions for the state are as follows:

"(1) The court instructs the jury for the state that they are the sole and exclusive judges of the weight of the evidence and the credibility of witnesses, and in determining how much weight or credit they will give to the testimony of any witness,

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if any at all, they may take into consideration the reasonableness or unreasonableness of such testimony; the fact, if such is shown by the evidence, that the witness has made contradictory statements about material matters in this case; that any witness has been convicted of any crime, if such is shown by the evidence; or if the jury believe from the evidence that any witness has sworn falsely to any material matter in this case the jury may disbelieve and disregard the whole testimony of such witness.

"(2) The court instructs the jury for the state that if they believe from the evidence beyond a reasonable doubt that the defendant deliberately raised a shotgun loaded with buckshot to his shoulder and fired it at Wm. Henry Applewhite, who was only a few feet away, and shot him in the cheek and tore away his nose with the contents of said gun, then the law presumes that defendant intended to kill appellant unless the contrary appear from the evidence in the case."

A. W. Shands, for appellant.

It was error to permit Taylor, the justice of the peace before whom the preliminary trial of appellant was held, to read in evidence, on the trial in the circuit court, any of the written memorandum of the testimony of the witness, Lula Ford, taken down by him on the preliminary trial. And it was error for the state to introduce as an exhibit to his testimony the written memorandum. Taylor testified that he had no remembrance of what the woman had stated in his court. The memorandum was not legally admissible as a record of evidence taken down in the justice's court, for there was no official certificate to it. It could not be used as an aid in refreshing the witness Taylor, for, although made by him at the time the woman made her statements as a witness before him, it did not refresh his memory. In answer to a question propounded to him by counsel for appellant before he had read the contents of the memorandum, he stated: "It does not refresh my recollection,

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but it is my writing, and I would swear that it is what was said during that trial. So far as refreshing my memory, I can only rely on this paper, for I don't remember a word that was said." The testimony of this state's witness, Taylor, was very material, if competent, as it went to prove statements made by appellant's principal witness when under oath, in conflict with statements made by her subsequently in the circuit court under oath. Hence, as it is submitted that the testimony was incompetent, its admission constituted reversible error.

The first instruction granted to the state was clearly erroneous. The last clause reads, "and if the jury believe from the evidence that any witness has sworn falsely to any material matter in this case the jury may disbelieve and disregard the whole testimony of such witness." This court has passed upon instructions such as this so often that it would seem that district attorneys in drawing instructions as to false swearing would by this time never fail to insert the qualifications that the false swearing must have been wilfully, knowingly and corruptly done. For unless the instruction contains such qualifications it is erroneous. *White* v. *State,* 52 Miss., 227; *Davis* v. *State,* 89 Miss., 119, 42 South. Rep., 541; *Finley* v. *Hunt,* 56 Miss., 221.

There was also error in the second instruction granted to the state. The sole defense relied upon by appellant was, that the shooting was accidental. The instruction charged the jury that if the appellant deliberately raised his shotgun and shot Applewhite, then the legal presumption is that appellant intended to kill Applewhite, unless otherwise distinctly shown. This instruction was erroneous for the reason that it failed to embrace the existence of malice aforethought, or that the shooting was done with the deliberate design in appellant's mind to effect the death of Applewhite. It merely instructed the jury on the weight of the evidence. In the case of *Hibbler* v. *State,* 87 Miss., 362, s.c., 39 South., 846, in a terse and clear opinion delivered by Justice TRULY, the court set out the things which

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a jury must believe in order to justify a conviction in a case of this kind. In the first place, the charge must be that the jury must believe from the evidence beyond reasonable doubt that the defendant fired the shot of his malice aforethought, a qualification not embraced in the instruction in the case at bar. The defense set up by Hibler, in the case cited, was that of self-defense. Justice TRULY stated that "the instruction must be that the jury must believe that the killing was not done in self-defense." The instruction must further charge the jury that the shooting was done with a deliberate design to effect the death of the person shot at, to justify a verdict against the defendant.

The second instruction for the state was erroneous for the further reason that it announced the proposition that in this particular case the shooting of Applewhite with a shotgun loaded with buckshot constituted proof of the intent of appellant to commit murder. This case is very much like that of *Raines* v. *State,* 81 Miss., 489, s.c., 33 South., 19, where this court said, "The only debatable point before the jury was, whether the gun was deliberately or accidentally fired by the defendant, and the court instruction is erroneous in making the use of the gun decisive of defendant's guilt merely because it was a deadly weapon. Whether the gun was accidentally or deliberately fired was a question which should have been left to the free determination of the jury, uncontrolled by the presumptions imposed upon them." See also *Hawthorne* v. *State,* 58 Miss., 778.

This second instruction for the state is further objectionable because inferentially it told the jury that an "intention to kill" was sufficient for the basing thereon of a verdict of guilty as charged in this case. This was of course a fatal defect. "One may intend to wound without intending to kill, and one may intend to kill, not as an act of murder but in necessary self-defense." *Thames* v. *State,* 82 Miss., 667, s.c., 35 South., 171.

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Brief for appellee.

R. V. Fletcher, assistant attorney-general, for appellee.

Appellant assigned for error that the state's witness, Taylor, was allowed to read to the jury from a paper what purported to be the evidence of the appellant's witness, Lula Ford, given on the preliminary trial. This paper was not certified to, nor was it offered in evidence. It was used by the witness, Taylor, to refresh his recollection. He stated on the witness stand that he wrote the paper at the very time Lula Ford was giving her evidence, in the justice's court, before him, and that it contained the substance of her testimony there, and that he knew that it was correct as written. It is contended by counsel for appellant that the testimony of Taylor was rendered incompetent because of the fact that the witness stated, after looking at the paper, that he still had no independent recollection of the contents of the paper.

Under the authorities the court did not err in receiving Taylor's testimony from the paper. See *Cooper* v. *State,* 59 Miss., 267, where an aged and infirm witness had very little recollection of the contents of a paper save that, as in the case at bar, the witness knew that the paper was correct. See also Greenleaf on Evidence, vol. 1, p. 437, and the authorities there cited. A careful examination of the authorities there presented shows that it makes no difference as to the inability of the witness to recall the facts independent of the paper, even after examination of the paper. The paper itself after complete identification was competent as original evidence. It would be just as competent as the stenographer's report of testimony when fully proven. The paper contained exact language of the witness taken down at the time it was uttered, and the witness, Taylor, was able to say with confidence that it was correct as written. *Railroad Company* v. *Echols,* 54 Miss., 264. See also 1 Wigmore on Evidence, sec. 1398, *et seq.*

As to the first instruction granted to the state, and of which appellant complains, it must be admitted that the charge would be more correct if the word "wilfully" had been incor-

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porated. It is hoped however, that the omission of this or other synonymous word will not, in a plain case like this, constitute reversible error.

As regards the contention of appellant that the second instruction for the state, as granted, constituted error, we would call the court's attention to the use of the word "deliberately" in the instruction, and submit the question to the court. The use of this word does not negative the theory of the killing being accidental.

CALHOON, J., delivered the opinion of the court.

The witness Taylor had no independent recollection of what the witnesses testified to in his court. Even the paper he had, as justice of the peace, there written, did not refresh his memory, for he had none, further than that he had taken down the testimony of the witnesses as delivered, and he knew it was correct. Under this state of facts the court did not err in receiving his testimony from the paper. In this conclusion we are not fully sustained by *Cooper* v. *State,* 59 Miss., 267, because there, after referring to the paper, the witness could recollect, while here he could not. But we are fully sustained by *N. O. R. R. Co.* v. *Echols,* 54 Miss., 264, and by the elaborate treatise in 1 Wigmore, Ev., p. 829, *et seq.,* and, as to criminal cases, 2 Wigmore, Ev., sec. 1398, *et seq.*

It was error to give the state's first instruction. The doctrine, *"Falsus in uno, falsus in omnibus,"* always dangerous in trials, should never be stated so broadly as here appears. The fact that a witness has sworn falsely to a material fact is not enough, unless he did it wilfully, knowingly, or corruptly. *Railroad Co.* v. *McCoy,* 85 Miss., 392, 37 South., 766, and the other cases cited in the argument of counsel for appellant.

It was error to give the state's second charge. The sole defense here is that the shooting was not by design, but accidental, and the facts were shown by eyewitnesses, so that *Raines* v. *State,* 81 Miss., 498, 499, 33 South., 19, 21, is pre-

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Syllabus.

cisely in point. We approve what is there said, on similar conditions, that "the third instruction for the state, which is based upon the principle of law that one is presumed to intend what he does, and the fourth instruction, which declares that malice may be inferred from the use of a deadly weapon, are inapplicable to the facts in this case. . . . Here the only debatable point before the jury was whether the gun was deliberately or accidentally fired." This is not a case for the entertainment of legal presumptions from the use of a deadly weapon. The instruction should have included the idea that the shooting must be believed to have been by design—not accidental. *Hibbler* v. *State,* 87 Miss., 362, 39 South., 896.

Reversed and remanded.

ALLIE SMITH *v.* STATE OF MISSISSIPPI.

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[43 South., 465.]

CRIMINAL LAW AND PROCEDURE. *Affidavit. Absent witness. Effect of admission. Instructions. Testimony of accused. Credibility. Witness. Cross-examination. Evidence. Comment on failure of accused to testify.*

Upon the second trial of an accused charged with homicide, the defendant being the only witness to the killing in his behalf, it was error:—

(*a*) To permit the state to show that the defendant's absent witness was present but not introduced by him at the former trial, the state having agreed that the witness if present would testify as shown in an affidavit read to the jury; and

(*b*) To allow the state to ask defendant when testifying in his own behalf, whether he had testified in his previous trial; and, without reference to whether the trial be a first or other one,

(*c*) To instruct the jury at the instance of the state that they should, in weighing the evidence, take into consideration defendant's interest in the result of the trial; and

(*d*) To allow the state to show on cross-examination of a witness that he claimed a reward for arresting the accused.

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Brief for appellant.

FROM the circuit court of, first district, Chickasaw county. HON. EUGENE O. SYKES, Judge.

Smith, the appellant, was indicted for murder, tried and convicted of manslaughter, sentenced to the penitentiary for a term and appealed—his first appeal—to the supreme court. The judgment of conviction was reversed and the case remanded for a new trial. The first supreme court decision in the case is reported. *Smith* v. *State,* 87 Miss., 627, s.c., 40 South., 229.

After the remand of the case the defendant was tried a second time; of course his second trial was for manslaughter. He was again convicted and sentenced to the penitentiary and appealed therefrom, this second appeal, to the supreme court.

The facts sufficiently appear in the opinion of the court.

Leftwich & Tubb, for appellant.

In this case the district attorney admitted what the witnesses would swear but intimated that there was a job put up on the jury somewhere and then introduced the stenographer to show that these witnesses did not testify at a former trial. Whether it was the fault of Smith, the witness, or of the attorneys for the defendant at the first trial, or whether the witness was then sick, or what other reason there might have been, is not in evidence, but certainly it is no impeachment of a witness at a second trial to show simply and only that he did not testify at the first. Lawyers are usually able to develop a case better at the second trial than at the first and we think the dealing of the district attorney with these witnesses of unimpeached character was harmful and it is this very thing the court animadverted upon in the case of *Scott* v. *State,* 80 Miss., 187, s.c., 31 South., 710.

Under the facts shown by this record it was of extreme importance to the defendant that the evidence presented to the jury should be carefully guarded from error. The state's case, if it should be conceded to have a case at all, hangs by too small a thread for error to be tolerated. It will be observed

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Brief for appellant.

that the learned district attorney below was not satisfied with the direct case affirmatively and positively made as to what occurred on the fatal encounter which only was competent, but he was constantly sidestepping in order to drag into the case the subsequent conduct of the defendant, or what occurred at the former trial of the case, or what was put in former motions for continuances, or who was introduced in evidence at the former trial, reproaching the defendant that he had never before testified, all of which hung as a cloud over the mind of the jury and prevented their dealing with the case as it was in a clear unprejudiced manner.

At the trial now under review defendant saw fit to take the stand in his own behalf and the learned district attorney then conceived, sidestepping again, that he might discredit his testimony by showing that he had not before testified in the case, either at the committal trial or at the first trial when he was convicted of manslaughter. *Bunckley* v. *State,* 77 Miss., 540; s.c., 27 South., 638; *Boyd* v. *State,* 84 Miss., 414, s.c., 36 South., 525.

In *Yarbrough's case,* 70 Miss., 593, this court held that all comment, friendly or unfriendly, was forbidden and said that a new trial would be granted regardless of the nature of the comment. In the *Sanders case,* 73 Miss., 444, s.c., 18 South., 541, the court reverses the case although the court rebuked the counsel and instructed the jury to disregard the comment and where the counsel asked the remark to be considered withdrawn. Now then, is a direct question made to the accused asking him if he had ever before testified in the case followed by the prompt objection of his counsel, anything more or less than a comment by the state's counsel, and an unfriendly comment at that? The jury saw at once that if it were possible for the defendant to answer that he had testified at a former trial, that the objection would not be interposed; they further saw from the argument of the defendant's counsel to the court that the answer would necessarily be in the negative, or the objection would not

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be insisted upon. So that looked upon from every standpoint, the question is a comment upon the accused's failure to testify made by the prosecuting officer. The asking of this question under the circumstances we submit was fatal error.

Charge No. 2 asked by the district attorney is as follows: "The court charges the jury that they are the sole judges and weighers of the testimony and the credibility of the witnesses and in passing upon the testimony of any witness the jury may take into consideration the interest such witness may have in the result of the trial, if any, such has been shown by the testimony in the case." It must be clear to the court that this charge is another thrust at the testimony of the accused and is in violation of § 1918 of the Code of 1906 and § 1741 of the Code of 1892. The accused was the only person who had any interest, other than a sympathetic one, in the result of the trial. He was one of the three living witnesses to the difficulty; he was allowed by the law to speak in his own behalf and he ought to have been allowed to do so, without comment or reference by any charge made. The charge might just as well have called the name of defendant Smith as to have been given in the words in which it was written. It could possibly have no other effect upon the minds of the jury than to warn them to mistrust the defendant's testimony. This they are liable enough to do under the heavy cannonading in his final argument by the district attorney. If added to that, the court is also allowed to warn the jury against his testimony, the poor defendant is beyond the hope of having any heed at all paid to what he says. We especially direct the attention of this court to the frank, manly, open, unreserved, and unfaltering statements made by this defendant. He kept back nothing, he simulated nothing. Troubled by his enforced taking of the life of a former friend in an unfortunate row, coming quickly up between young men all alike guilty of being on a lark, he tells the facts appertaining to the difficulty and to his past life unreservedly and frankly.

The two annotations under § 1918 of the Code are as

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Opinion of the court.

follows: "The testimony of the accused should have such effect as it deserves unfettered by instruction to weigh it carefully and with great caution." Three several decisions by this court are cited in support of that annotation made by the learned Code commissioners and enacted into the laws by the legislature. That annotation is just as much legislative as the words of the section itself. The construction made in those three cases of this section as expressed in the annotation is enacted into the subsequent law by the legislature when the section is adopted followed by the annotation itself.

CALHOON, J., delivered the opinion of the court.

On the application for continuance the state agreed that the defense might read what the affidavit for it set forth would be sworn to by the absent witness, to have the same effect as if he had been present and had so testified. Notwithstanding this, the state was permitted in rebuttal, in a very close case as this is, to show by the stenographer that on the previous trial that witness had not been introduced by the defense. We think this error. It could have had no sort of bearing on the credibility of the absent witness, but was a direct assault on defendant's affidavit for the continuance; and this was not a trial for perjury in making that affidavit (*Scott* v. *State,* 80 Miss., 197, 31 South., 710), and was an overload on the accused.

We think it was error to give the state's second instruction. The defendant was the only witness to the fact in his own behalf, and the charge would have been no stronger if it had called his name and cautioned the jury, in its own language, to "take into consideration the interest such witness may have in the result of the trial." His testimony should not be so hampered by such express reference. See annotations to § 1918, Code 1906.

It was improper to allow the state to show, on the cross-examination of the witness Alred, that he claimed a reward for

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Statement of the case.

arresting accused. It had no bearing on what he had testified to, and could only tend to hamper the defense.

The question to defendant, as a witness, whether he had ever testified, was improper, and equivalent to a comment to the jury on his nonappearance as a witness on the previous trial of the case. By all our adjudications this is sacred ground. *Yarbrough* v. *State,* 70 Miss., 594, 12 South., 551; *Sanders* v. *State,* 73 Miss., 444, 18 South., 541; *Reddick* v. *State,* 72 Miss., 1008, 16 South., 490. Rulings must be examined by the light of the evidence as a whole.

Reversed and remanded.

CHARLES W. WARD ET AL. *v.* DAVID AND JONATHAN LODGE, NUMBER 1,976, GRAND UNITED ORDER OF ODD FELLOWS IN AMERICA.

[43 South., 302.]

1. BENEFIT SOCIETIES. *Membership. Recourse to courts. Remedies within order.*

Where the laws of a benefit society provide appeals for the correction of erroneous decisions touching the rights of its members, an application by a member to the courts for relief will not be entertained until he has exhausted his remedies within the society.

2. SAME. *New laws. Validity.*

A duly enacted law of a benefit society creating a compulsory insurance department, requiring the payment of a dollar per month by its members, except the aged and disabled, and barring those who fail to pay from meeting with a lodge is reasonable and valid, and, the by-laws authorizing it, may be applied as well to existing as to new members.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Ward and others, the appellants, were plaintiffs in the court below; the David, etc., Lodge, the appellee, was defendant there.

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Brief for appellants.

From a judgment in defendant's favor, the plaintiffs appeal to the supreme court.

The suit was for a mandamus and the plaintiffs charged that they were members of the defendant lodge, having paid dues, assessments, etc., and had been denied admission to, and the rights and privileges of membership in, the lodge because they had failed to take out the lodge insurance policy issued by a department of the defendant order. The defendant filed a special plea setting up the enactment of a law, by a two-thirds vote of the order, creating a compulsory insurance department, and that the petitioners had failed to take out insurance as required by this law; that they had received due notice of the requirement, and had been given opportunity to comply with its mandates, that the law applied to all members of the order at the time it was passed, as well as to future members; and, further, that petitioners had not availed themselves of their right to appeal to the designated authorities of the order.

The plaintiffs demurred to this plea, but their demurrer was overruled; they declined to plead further and judgment final went for defendant.

McFarland & McFarland, for appellants.

The only question presented by this case is whether the by-law in regard to compulsory insurance passed by the Grand Lodge in Mississippi was reasonable and not void as to appellants. If it is void their expulsion under said by-law was void and they were under no duty to appeal therefrom to a higher tribunal with the society. 24 Fed., 450; 28 Mo. App., 463; 50 Mo. App., 45; 41 Mo. App., 359; 129 Ill., 298; 108 Iowa, 430; 55 L. R. A., 185; 49 L. R. A., 353 and notes; 3 L. R. A. (N. S.), 496.

Again these parties were excluded from the lodge without notice and without trial. There being no trial they had nothing to appeal from. See Laws G. U. O. F., 97, 98, 99; Bacon Ben. Soc. (ed. 1888), sec. 101 and cases; 62 Am. St.

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Brief for appellee.

Rep., 709; 53 N. W. 239; Niblack Mut. Ben. Soc., sec. 65; 7 Am. St. Rep., 167; 18 Am. St. Rep., 301; 59 Am. St. Rep., 201.

Mandamus is the proper remedy for reinstatement in a lodge where relators are wrongfully excluded and the petition need not state in so many words that relators have no other adequate remedy. The sole desire of petitioners is to be reinstated in the lodge and they do not seek damages.

Mandamus is the sole remedy. 8 L. R. A., 195; 59 Am. St. Rep., 201. The provisions of General Law 112 under which the Grand Lodge of Mississippi passed its order in regard to compulsory insurance was prospective in operation and only meant to apply to future initiated members.

All laws passed by benevolent societies will be held to apply prospectively and not retrospectively unless the language used positively prevents this interpretation. 42 S. E., 236; 29 Am. St. Rep., 603; 68 Am. St. Rep., 306; 89 Am. St. Rep., 193; 1 L. R. A. (N. S.), 1064.

George C. Paine, for appellee.

Before appellants will be permitted to resort to the courts of the state to redress any supposed grievance they may have against the order to which they belong, they must first apply to the order and follow the mode indicated in the constitution and the laws of the order; they must allege and prove that they have done this and found that remedy and mode unavailing. *Robinson* v. *Templar Lodge,* 59 Am. St. Rep., 193.

But say counsel for appellants that the appellants were excluded without notice and hence had nothing to appeal from, to this I answer that the laws of the order, to-wit, law 67, p. 62, Exhibit A, states that any member who is non-financial, which interpreted, means in arrears for dues, cannot meet with his lodge, and sec. 9, p. 22, Exhibit B, requires a payment of $1 per month as an assessment for the insurance law.

Now the petition alleges that the appellants were refused ad-

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mittance to the lodge room because they have not paid this assessment.

Then we have an assessment, a refusal to pay and a resultant refusal to admit to the lodge room.

What then, may I ask, prevented appellants from appealing this refusal to the constituted authorities?

Certainly appellants who allege that they had been members of long standing, knew their rights, knew that they could have embodied all their grievances in a bill of exceptions, and then had a trial and decision from their appellate officers.

But counsel press the point and say that the appellants had no notice, etc.

To this I answer, the pleas and the exhibits assert and show that these appellants were repeatedly notified and urged to pay up.

This insurance law or department was as alleged in the pleas submitted to the various district grand lodges, including appellees, and by them after the mode and manner prescribed voted upon by appellants, and was after the election declared by the constituted authorities to be a law of appellees' lodge. This law was duly and legally enacted, that is in conformity to the law of the order, and was in keeping with the intent and spirit of the order and it cannot under these circumstances be asserted successfully to impair the vested rights of the appellants. The case of *Woodmen* v. *Woodruff*, 80 Miss., 546, s.c., 32 South., 4, is conclusive against this contention of appellants.

I submit appellants have not brought the proper or appropriate remedy for the correction of their grievance.

Mandamus is not the proper remedy. Mandamus is not a revisory remedy, it is not a remedy adapted to the correction of mere errors of judgment or proceeding.

CALHOON, J., delivered the opinion of the court.

By consent the court below had, and we have, the general laws of the order and the by-laws of the district organization to

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consider in determining the demurrer of appellant to the plea of appellee to the petition of appellant for mandamus.

The association was "for the purpose of maintaining, managing, and controlling a benevolent and friendly society." It originally had numerous laws adopted by it, the first one of which avowed the object to be "for raising a fund for the relief of the members when sick, lame, or disabled, and for insuring a sum of money to assist in defraying the expenses of burial (to be paid to the widow, legal executors, administrators, or assigns of a member deceased), or to assist in defraying the expenses of the burial of the wife or child of a member." By law No. 8 of the order it is provided that new laws may be adopted by a two-thirds vote. By this two-thirds vote a law was enacted by the order creating a compulsory insurance department, requiring payment of $1 per month by all members. Accordingly this was applied to all members, except those over seventy years old or who became blind or paralyzed while members, etc. This, we think, applied to the then members and to future members. It was further provided that those who failed to pay should no longer meet with the lodge. The appellants refused to pay, though repeatedly notified to do so, and so were refused admittance; and hence their application for a writ of mandamus.

Appeals are amply provided for within the order, but appellants took no appeal there before applying to the courts, and therefore, as we think, have no standing in court. We also think the law of the order, enacted by a two-thirds vote, became a valid law of the order, and was not unreasonable or void.

Affirmed.

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Statement of the case.

HENRY GREENBURG *v.* WILLIAM MASSEY.

[43 South., 1.]

JUSTICE OF THE PEACE. *Pleadings. Statement of cause of action. Code* 1892, § 2401.

The filing of an affidavit simply charging that defendant is justly indebted to plaintiff in a designated sum does not comply with Code 1892, § 2401, requiring any one desiring to sue before a justice of the peace to lodge with him "the evidence of debt, statement of account or other written statement of the cause of action" of which the suit is predicated.

FROM the circuit court of Pike county.

HON. MOYSE H. WILKINSON, Judge.

Massey, the appellee, was the plaintiff in the court below and Greenburg, the appellant, was defendant there. From a judgment in the court of a justice of the peace in plaintiff's favor the defendant appealed to the circuit court; and from the judgment of the circuit court in favor of plaintiff defendant appealed to the supreme court.

The plaintiff, Massey, brought suit against the defendant in the court of one Harrell, a justice of the peace, by filing an affidavit, which simply averred that defendant was justly indebted to plaintiff in the sum of $160.

The defendant, Greenburg, appeared in the justice's court, and judgment was rendered against him for $135, alleged damages to a horse hired by defendant from plaintiff. The defendant appealed to the circuit court, and there demurred to plaintiff's affidavit (treating the same as a declaration), because no evidence of debt had been filed in the justice's court as required by Code 1892, § 2401, providing that anyone desiring to sue before a justice of the peace shall lodge with him the evidence of debt, statement of account, or other written

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Brief for appellant.

statement of the cause of action. The demurrer was overruled and defendant moved the court to require plaintiff to furnish a bill of particulars, but the motion was also overruled. In the circuit court, the plaintiff was permitted to prove his claim against the defendant for alleged damages to a horse defendant had hired from plaintiff and overdriven and maltreated. The jury returned a verdict in plaintiff's favor for $125, and judgment against defendant, based thereon, was rendered accordingly, from which the defendant appealed to the supreme court, assigning for error, among other things, the failure of the defendant to file a written statement of his cause of action as required by the statute.

Quin & Williams, and *F. H. Lotterhos,* for appellant.

The case must be reversed, because the plaintiff did not file a written statement of his cause of action at the commencement of his suit. Code 1892, § 2401.

The mere filing of an affidavit by plaintiff that the defendant, Greenburg, was justly indebted to plaintiff, Massey, in the sum of $160, was insufficient.

The defendant made timely objection to the cause's proceeding further with the pleadings in such condition, by his motions before the introduction of evidence, in the circuit court.

It is true that the pleadings in the court of a justice of the peace are informal, but there must be some basis absolutely required upon which to found a suit in that court. The requirements are very simple, but they must be complied with.

On inspection of the affidavit, can one tell the nature of the demand? Is it based on contract? Or is it *ex delicto?* What is the nature of the demand? There must be such a written statement of a cause of action, under Code 1892, § 2401, as can be successfully pleaded as *res judicata* by the defendant, if sued again on the same charge or demand. *Butts* v. *Phelps,* 79 Mo., 302.

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Opinion of the court.

Mixon & Butler, for appellee.

No pleadings are required in the court of a justice of the peace. A statement of account by plaintiff is sufficient for the commencement of a suit. Code 1892, § 2401.

It is within the discretion of the trial court to grant or refuse bills of particulars. No effort was made by defendant to satisfy the court by affidavit or otherwise that for the purposes of his defense on the trial it was necessary that his adversary be more specific. Defendant failed to follow the requirements of the statute, Code 1892, § 705, in demanding a bill of particulars.

While it may be that the more correct procedure would have been for plaintiff to file a bill of particulars, yet, where it is obvious, as in this case, that the defendant suffered no embarrassment for want of the same, there can be no reversible error because of plaintiff's failure to furnish it. *Thomas* v. *Shell,* 76 Miss., 556, 24 South. Rep., 876. There was no application by defendant, Greenburg, to require the plaintiff to make the pleading more definite and certain, or to strike it from the files, as provided by Code 1892, § 704.

Argued orally by *F. H. Lotterhos,* for appellant, and by *George Butler,* for the appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The statute (§ 2401, Ann. Code 1892) requires a written statement of the cause of action. The widest liberality that can be indulged as to pleadings in the courts of justices of the peace cannot cover a total failure to file any written statement of the cause of action whatever. The true rule is that there must be such a written statement of the cause of action as can be successfully pleaded by the defendant, if sued again on the same cause of action—such a statement as will give the defendant the benefit of a plea of *res judicata.* This is clearly shown by the case of *Butts* v. *Phelps,* 79 Mo., 302.

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Statement of the case.

The case of *Thomas* v. *Shell Bros.*, 76 Miss., 556, 24 South., 876, is in perfect harmony with this. We have examined the original record in that cause (*Thomas* v. *Shell Bros.*), No. 8692 of this court. We find that the statement therein did show the real ground of action, but misnamed it merely. The statement was for "services as bookkeeper." It was amended to "salary" as bookkeeper. The thing sued for was the value of the bookkeeper's work, whether called "services" or "salary." The language of the opinion is somewhat too broad, but the decision is in perfect harmony with our own. The court, therefore, erred in not requiring a proper statement of the cause of action to be filed. The defendant was not apprised, by the one filed, whether the action was in tort or contract, or for what the suit was brought.

The judgment is reversed, and the cause remanded, with leave to amend.

Alfred A. McCue *v.* William Massey.

[43 South., 2.]

Parties. *Substitution. Amendment. Trustee having legal title. Practice.*

Where the beneficiary in a deed of trust erroneously brought an action of replevin in his own name for the property conveyed, an amendment making the trustee plaintiff in the suit, seasonably asked, should have been allowed in the circuit court, although the case originated in a justice of the peace court.

From the circuit court of Pike county.

Hon. Moyse H. Wilkinson, Judge.

McCue, the appellant, was plaintiff, and one Duncan was defendant, in the court below; Massey, the appellee, was claimant of the property in controversy. From a judgment predicated of a peremptory instruction, the plaintiff appealed to the supreme court.

The appellant, McCue, was the beneficiary in a chattel deed

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Brief for appellant.

of trust executed by Duncan to Holmes, as trustee, and covering certain horses, vehicles and harness. Appellant instituted replevin in the court of a justice of the peace against Duncan for possession of the property, bringing suit in his own name instead of in the name of Holmes, the trustee. Duncan made no defense to the suit. The appellee, Massey, however, interposed a claimant's affidavit, and on the trial the justice of the peace rendered judgment in favor of plaintiff, McCue, against defendant, Duncan, and against claimant, Massey, and Massey, the claimant, appealed to the circuit court. On the trial in the circuit court, the sole issue being the respective rights of the claimant and the plaintiff to the property, and the claimant having assumed the burden of proof, and having closed his testimony and rested his case, the plaintiff, McCue, offered in evidence the deed of trust executed by Duncan. The claimant objected to its introduction, and the objection was sustained. The plaintiff, McCue, thereupon moved the court for leave to substitute as plaintiff the trustee, Holmes. The court overruled the motion, and, as plaintiff introduced no further relevant evidence, granted a peremptory instruction in favor of the claimant, Massey.

It will be noted that objection had not been made by defendant, Duncan, to the suit's having been brought by the beneficiary instead of the trustee in the deed of trust.

Quin & Williams, and *F. H. Lotterhos,* for appellant.

In view of the fact that Duncan, the debtor, who executed the deed of trust in favor of appellant, made no objection to the proceedings in the justice's court, it was error for the court below to deny to McCue, plaintiff in the justice's court, the right to introduce the deed of trust in evidence as showing his right to possession of the property. In the circuit court Duncan was not an active party to the suit. The issue as between Duncan and McCue was settled, Duncan having prosecuted no appeal from the judgment of the justice of the peace. The

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Brief for appellee.

proposed substitution of the trustee, Holmes, as plaintiff, would not, as against the claimant, have prejudiced any substantial rights of the parties. It would not have so changed the suit as to make it a different cause of action; the issues involved would have remained the same.

The practical effect of the motion was merely to amend the pleadings, so as to make them conform to the facts and to bring the merits of the controversy fairly to trial.

Code 1892, § 717 (Code 1906, § 775), provides for liberal amendments before verdict.

In support of our contention that the court erred in not permitting the substitution, see *Montague* v. *King,* 37 Miss., 441; *Tully* v. *Herrin,* 44 Miss., 626; *Denton* v. *Stephens,* 32 Miss., 194; *Dyer* v. *Brittain,* 53 Miss., 270; *Shannon* v. *Rester,* 13 South. Rep., 587; *Startton* v. *Taylor,* 32 Miss., 201; 1 Ency. Pl. & Pr., 484; 20 *Ibid,* 1023.

Mixon & Butler, for appellee.

It was not error for the court below to refuse to allow McCue's affidavit in replevin to be amended so as to make the trustee, Holmes, instead of McCue, plaintiff. We recognize the Code 1892, § 717, provides that amendments of pleadings may be liberally allowed; but if such amendment had been allowed, the record would have shown a judgment in the justice's court against Duncan, based upon McCue's original affidavit in replevin, unappealed from by Duncan; while, in the event of a decision in the circuit court against the claimant, there would have been a judgment in the same case in favor of Holmes, trustee, against Massey.

The affidavit might have been amended in the justice's court, or even in the circuit court, if the judgment as between McCue, creditor, and Duncan, debtor, had been appealed. McCue had no authority under the deed of trust to sell the mortgaged property; Holmes, the trustee, could alone do that. But the attempt to amend was not made by Duncan, but by

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Syllabus.

Massey, whose position in the case was merely that of a claimant. As this was a suit in replevin, limited by the statutory provisions applicable thereto, and as the original proceeding in the justice's court was to determine whether McCue or Duncan had the right to the possession of the property, the action of the court below was correct.

Argued orally by *F. H. Lotterhos,* for appellant, and by *George Butler,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The court erred in not permitting the amendment offered, substituting Holmes for the use of McCue as plaintiff.

Reversed and remanded.

NELSON T. BURROUGHS, ADMR., ET AL. *v.* J. A. GILLILAND ET AL.

[43 South., 301.]

1. VENDOR AND VENDEE. *Lien. Purchase money. Erection of plant. Payment out of gross receipts.*

The lien of a vendor of land for a fixed part of the unpaid purchase money is not affected by a provision in the deed that payment is to be made out of the gross receipts of a manufactory to be erected on the land by the vendee, which was never in fact erected.

2. SAME. *Equity practice. Conflict between bill and exhibits.*

A conflict between some of the allegations of a bill of complaint and the exhibits thereto is not fatal on demurrer if the other allegations and exhibits present a good case.

3. CONTRACTS. *Performance. Reasonable time.*

An agreement to perform an act which fails to specify the time of performance will be treated as providing for performance within a reasonable time.

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Statement of the case.

FROM the chancery court of Attala county.

HON. JAMES F. McCOOL, chancellor.

The appellees, Jones A. Gilliland and Mrs. Pattie Lee Gilliland, executrix and sole devisee of the will and estate of her deceased husband, John W. Gilliland, were complainants in the court below, and the appellants, N. T. Burroughs, administrator of the estate of Roy C. Burroughs, deceased, and others, heirs at law of Roy C. Burroughs, were defendants there. From a decree overruling their demurrer to the bill of complaint the defendants appealed to the supreme court.

Complainants' bill prayed that a vendor's lien in their favor be decreed to exist on certain land for the payment of a balance of $2,500, part of the purchase price of the land as shown in a deed from Jones A. Gilliland and John W. Gilliland to Roy C. Burroughs, and that the same be foreclosed in chancery. The deed, which was an exhibit to the bill, provided as follows:

"Whereas, R. C. Burroughs purposes erecting on the lands hereinafter described a stone plant for the quarrying and manufacturing of the stone situated in and upon said lands; and whereas, to that end the said Burroughs heretofore entered into a contract with J. A. Gilliland and John W. Gilliland, wherein they agreed to convey to him in fee simple the N. ½ of the N. W. ¼ of section 9, township 14, range 7 east, in Attala county, Mississippi, and all of their right, title, and interest in and to certain leasehold contracts to the lands in said county, hereinafter described, owned and controlled by the said J. A. and John W. Gilliland, for the terms of which said leases they agree to warrant the title to said lands, during said terms, the consideration to be paid therefor being $5,000, and $2,500 additional to be paid to them by the said R. C. Burroughs from out of the first gross profits of said stone plant, after the same shall have been installed and put into operation; and whereas, at the date of the execution of said contract R. C. Burroughs

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Statement of the case.

paid to the said J. A. Gilliland and John W. Gilliland the sum of $500 in cash, leaving a balance due of $4,500 under the terms of said contract, which sum of money has since been paid: Now, therefore, in consideration of the sum of five thousand ($5,000) dollars in cash, paid to us, the receipt of which is hereby acknowledged, and the further consideration of the said R. C. Burroughs paying to us the sum of twenty-five hundred ($2,500) dollars from out of the first gross profits of said stone plant after the same shall have been installed and put into operation, we, the said J. A. Gilliland and John W. Gilliland, convey and warrant in fee simple to the said R. C. Burroughs," etc.

The bill alleged that the complainant, Mrs. Pattie C. Gilliland, was the surviving widow and sole legatee of John W. Gilliland, deceased, and that Roy C. Burroughs had departed this life, leaving as his personal representative the administrator, N. T. Burroughs, and as his heirs the other defendants named in the bill; and that the stone plant proposed to be erected on said land had not been built nor put into operation, and that the sum of $2,500, due as a part of the consideration was unpaid, and that under the circumstances the complainants were entitled to have a lien upon the land conveyed in the deed, for the said sum.

The defendants demurred to the bill on the ground that the purchase price of the land, as shown in the deed, was $5,000, all of which, according to the recitals of the deed, had been paid, and that the payment of the $2,500 was an independent and collateral undertaking payable out of the first gross profits of the stone plant after it had been erected and put into operation. The demurrer further alleged that the bill and the deed, which was an exhibit thereto, were contradictory of each other. The court having overruled the demurrer, the defendants appealed to the supreme court to settle the principles of the cause.

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Brief for appellants.

William Griffin, for appellants.

The recitals of the deed and the allegations of the bill of complaint (of which the deed is an exhibit) are in hopeless conflict with each other, for the deed does not show, what the bill alleges, that the total consideration to be paid was $7,500. On the contrary the deed recites in unmistakable terms that the purchase price of the land was $5,000, of which $500 had been paid by Burroughs when he entered into the contract with the Gillilands, and the balance of $4,500 was paid when the deed from the Gillilands was executed. The payment of the $2,500 was to be based upon the erection of a stone plant, and the agreement as to this, though expressed in the deed, was a collateral undertaking entirely disconnected with the purchase price of the land.

It has been decided several times by this court that where a bill of complaint contradicts the recitals of its exhibits, the facts stated in the exhibits will control. *House* v. *Gumble,* 78 Miss., 259, s.c., 29 South., 71; *Montgomery* v. *Bank,* 79 Miss., 446, s.c., 30 South., 635; *McNeill* v. *Lee,* 79 Miss., 455, s.c., 30 South., 831.

The bill of complaint does not charge fraud, accident or mistake, and in no case would parol evidence be admissible to vary the terms of the deed, which, as above stated, is an exhibit to the bill. The deed is not ambiguous. It explicitly states that the $2,500 was to be paid by Burroughs from out of the first gross profits of the stone plant, after the same shall have been installed and put into operation. As the deed must be considered as containing all the agreements of the parties in the matter, it is self-evident that the decision of the lower court in overruling the demurrer was incorrect. *Baum* v. *Lynn,* 72 Miss., 932, s.c., 18 South., 428.

The purchase price of the land was $5,000, all of which had been paid, but Burroughs was willing to pay the additional sum of $2,500, on a business venture, contingent upon the erection of a stone plant and to be paid out of the gross profits

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Brief for appellants.

to be made therefrom in future. The land was not looked to for payment of this $2,500. This sum could not be collected by the Gillilands until the stone plant should have been erected, the plant placed in successful operation, and profits accrued; and then payment should be made out of the gross profits. In case of the erection of the stone plant and its operation at a loss, there being no gross profits, could the $2,500 have been claimed as due?

The agreement in regard to the "$2,500 additional to be paid them by the said R. C. Burroughs from out of the first gross profits of said stone plant, after the same shall have been installed and put into operation," was simply an independent collateral undertaking, dependent upon the successful operation of a commercial enterprise to be thereafter entered into, the payment of which was contingent upon the success thereof.

For a debt to be secured by a vendor's lien the debt must be for the purchase money of property, and a lien will not exist in behalf of an uncertain or unliquidated demand, or the fulfilment of conditions embracing an idefinite period. 29 Am. & Eng. Ency. Law (2d ed.), 744; *Peters* v. *Tunnell,* 19 St. Rep., 255; *Griffin* v. *Byrd,* 74 Miss., 32, s.c., 19 South., 717. See also *Parrish* v. *Hastings,* 48 Am. St. Rep., 50, 102 Ala., 414; *Betts* v. *Sykes,* 2 South. Rep., 648; *Suddeth* v. *Knight,* 14 South. Rep., 475.

J. Gordon Smythe, on the same side.

It is manifest from the deed of the Gillilands to Burroughs that the additional $2,500 mentioned therein was not intended to be a part of the consideration such as to give the vendors a lien on the land sold for the payment of the same. The $2,500 was based upon a venture which was purely speculative and uncertain, resting upon a contingency, for the happening of which no definite time was fixed. The vendors, recognizing the speculative nature of the transaction, were willing to

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take their chances of getting an additional $2,500 out of the property sold, and the vendee, for the same reason, was willing to pay the same upon the happening of the contingent event, to-wit, the successful erection and operation of the stone plant.

The liability of the vendee to the vendors, as regards the $2,500, was not an absolute debt, but was a contingent event clearly expressed in the deed. There could be no vendor's lien as to this $2,500. In order that a vendor's lien may arise it is fundamental that there should be an ascertained, fixed consideration either of money or its equivalent, whereby there arises a certain absolute debt of the vendee to the vendor in consideration of the transfer of the land. 29 Am. & Eng. Ency. Law (2d ed.), 744. See also the many cases there cited. The cardinal rule seems to be that the lien lies only for a debt which may be either in money or rendition of services or any other valuable consideration, definite, ascertained and stipulated as the equivalent of the amount of the purchase money, and arising out of the sale of the land against which the lien is sought. *Griffin* v. *Byrd,* 74 Miss., 32, s.c., 19 South., 717.

The deed shows that the $2,500 was to be paid by Burroughs upon a purely speculative happening, *i. e.,* the installation and operation *at a profit* of the stone plant to crush stone on the land. Now, in case it had developed on investigation that the appearances of the land as to stone therein deposited were deceptive, and that no such quantities of stone were found as would justify the enormous expense necessary toward the erection of a stone-crushing plant, nothing would ever be due to the vendors. The parties, having such contingent happenings in their minds, used the language as shown in the deed. And from this language we must conclude that the additional $2,500 was conditional, to be paid only on the happening of the contingency stated therein, the operation of the plant at a profit.

There must be a clear reservation of a lien in a deed before

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Brief for appellees.

the law will hold that there is a lien. *Moore* v. *Lackey,* 53 Miss., 85.

Coming now to a consideration of that ground of the demurrer, as to the contradiction between the bill and the deed, its exhibit, we submit that this case falls squarely within the rule laid down by our supreme court, that "where the averments in the bill contradict a statement in some exhibit made a part of the bill, the exhibit will be taken to contain the true state of facts. *House* v. *Gumble,* 78 Miss., 268, s.c., 29 South., 71.

Hooker & McBee, for appellees.

The deed states that it is made in consideration of $5,000 cash, and the further consideration of $2,500 to be paid out of the "gross profits" of the stone plant to be erected on the land described in the deed. There is nothing speculative about the deed.

The law presumes the retention of a lien in favor of the unpaid vendor, unless the terms of the contract of sale or the concomitant circumstances to the transaction satisfactorily show that the lien was purposely excluded and that the vendor relied on the personal credit of the vendee. 29 Am. & Eng. Ency. Law, 742.

Counsel for the appellants contend that the fact that payment of the $2,500 is to be made from "gross profits" of the stone plant, indicates an understanding that the vendors were to look solely to the prospective profits of the plant. As a proof that the vendors expected to look, not to the land, but to these profits, for the payment of the $2,500, they argue that the parties to the deed purposely used the language shown therein. We submit, however, that there is nothing in the contract between the parties which binds the appellees to look alone to the profits of the stone plant for the payment of this $2,500. The deed merely fixes a sum certain to be paid and in its designation of the gross profits, says from what fund the money shall come. But the appellant was to remain per-

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sonally liable therefor until the debt should be satisfied. And the appellees expected to have a lien therefor on the land. Any other construction of the deed would make the collection of the $2,500 contingent upon the right doing or wrong doing of the vendee, Burroughs, and place the matter of payment entirely in his hands, to be defeated by him at his pleasure; that is to say, he would, under the contention of opposing counsel, have the right to sit calmly down and do nothing toward the carrying out of his contract, while the appellees, who sold him the land, would be forever barred from the collection of a just debt. Such cannot be the law. We submit that, under the wording of the contract, even if the appellee failed to erect the stone plant, appellees had the right, anyhow, to resort to the land for the payment of the $2,500. *Harvey* v. *Kelly,* 41 Miss., 490; *Deason v. Taylor,* 53 Miss., 700.

Opposing counsel contend, and it is one ground of the demurrer to our bill, that the bill and the deed, which is an exhibit to the bill, contradict each other. While there may be immaterial differences, we submit that both bill and deed show that there was $2,500 due by appellant to appellees, as purchase money of the land, and that it was unpaid. The recitals of the deed show this. Hence there can be no such conflict as will constitute grounds of reversal. *Baum* v. *Lynn,* 72 Miss., 932, s.c., 18 South., 428.

MAYES, J., delivered the opinion of the court.

In the case of *Griffin* v. *Byrd,* 74 Miss., 32, 19 South., 717, in speaking of the cases in which a lien in favor of the vendor of real estate is raised, the court says: "The rule of law on this subject is that the vendor's lien is only raised when there is a fixed sum of money due from the vendee to the vendor as purchase money for the land conveyed"—citing *Peters* v. *Tunnell,* 43 Minn., 473, 45 N. W., 867, 19 Am. St. Rep., 252; 28 Am. & Eng. Ency., p. 166, note 2, and cases there cited.

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Opinion of the court.

When this deed, made Exhibit C to the bill of complaint, is examined in the light of the rule thus established by this court, there can be no doubt but that appellees are entitled to a lien on the property described in the deed of J. A. and J. W. Gilliland to Roy C. Burroughs. The deed states that it is made in consideration of $5,000 cash, and the further consideration of $2,500 to be paid out of the "gross profits" of a stone plant to be erected upon the lands conveyed. By this deed there becomes a fixed sum of money due from the vendee to the vendors, and this sum of mony is due solely for the purchase money of the land conveyed. See, also, *Patterson* v. *Edwards,* 29 Miss., 67, on page 71. The contract, as shown by the deed, meets all the requirements of the rule laid down in *Griffin* v. *Byrd, supra.* The recitals of the deed show that it was contemplated by the parties at the time the deed was executed that a stone plant should be erected by the vendee on the lands, and that from the fund created by the erection of this plant, if erected, the vendee was to have the right to pay the balance of the purchase money due on the land. But the erection of the stone plant by the vendee formed no part of the consideration for the transfer of the land by the vendors to him. The contract merely gave him the right to pay the balance of the consideration due on the property out of the "gross profits" of the stone plant, whatever may have been meant by the use of the term "gross profits."

The bill alleges that appellants failed to erect the stone plant, as it was understood that they should do, and because of their default in this, and failure to pay the balance of the purchase money due under the deed, they ask that a lien be established on the property conveyed for the $2,500 unpaid purchase money. We think they clearly have this right. Appellants cannot defeat the appellees in the collection of the balance of their purchase money by failing to establish a stone plant, out of which to create a fund to pay the balance due as purchase money for this property. There is nothing in this contract

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which binds the appellees to look alone to the proceeds of the stone plant for the payment of the balance of the purchase money due under the contract of sale. If appellants had erected the stone plant, appellees had the right to have the balance due them paid out of the proceeds of the plant; but, the appellants failing to erect the plant, appellees had the right to resort to the land anyway.

It is true that some allegations in complainants' bill conflict with the exhibits filed, and it is also true that this court has held that where this is the case the exhibits control; but, after eliminating those parts of the bill that conflict with the exhibits, the record still shows that there was $2,500 due as purchase money, and that it was unpaid. This being the case, a good case is made out by the remainder of the bill and exhibits. The contract specifies no particular time when the appellees should erect the plant; but it was certainly contemplated by the parties that the plant should be erected and put in operation in some reasonable time, and since the bill alleges a total failure to erect the plant, and it is demurred to, no question is raised in the record as to whether or not a reasonable time has passed. *Hall* v. *Eastman & Gardner Lumber Co.*, 89 Miss., 588, 43 South., 2.

Affirmed and remanded, with leave to answer in sixty days after mandate is filed.

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Syllabus.

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ALONZO COOK v. STATE OF MISSISSIPPI.

[43 South., 618.]

1. CRIMINAL LAW AND PROCEDURE. *Jury. Selection. Code* 1892, § 2389.

Where officers charged with the duty of selecting juries poured the slips of paper containing the names of the qualified jurors from the jury boxes and read and selected such as they wished, instead of drawing them by lot from the boxes, the selection was illegal and the panel should have been quashed, notwithstanding Code 1892, § 2389, declaring all laws relating to the selection of juries to be directory.

2. SAME. *Harmless error.*

Where in a murder case, after the exhaustion of the special venire, the court, on motion of defendant, directed the sheriff to call bystanders, not of the regular panel for the week, and none of said panel served on the case, the accused cannot complain, after conviction, of irregularities in its selection.

3. SAME. *Selection of juries. Procedure. Laws* 1896, *ch.* 84, *p.* 93.

Where the supervisors of a county prepared at its first meeting in the year a list of persons to serve as jurors in the circuit court and the names of the jurors for the different supervisors' districts were placed in separate boxes, without tops, and these were placed in a larger box with a sliding top, sealed with a paper cover, and the box was kept locked, the jury box was prepared in substantial compliance with Laws 1896, p. 93, ch. 84, providing that the names of the persons selected to serve as jurors from each supervisor's district shall be put in a separate box, which shall be kept sealed, etc., especially in view of Code 1892, § 2389, declaring that the provisions of law relating to the drawing of juries are directory.

4. SAME. *Drawing on wrong day.*

The preparing of a jury list for a term of court by the proper officers more than fifteen days before the commencement of the term, though the law provides that the selection shall be made within fifteen days of the opening of the term, is an irregularity, and does not warrant the quashing of the panel, under Code 1892, § 2389, providing that the provisions of the law in relation to the drawing of juries are directory.

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Statement of the case.

5. SAME. *Prejudicial error.*

Where unfairness in the method of securing jurors is shown, a substantial right of a litigant is invaded, and the supreme court will set aside the verdict of such a jury on timely objection being made, notwithstanding Code 1892, § 2389, which provides that the provisions of the law in relation to the drawing of juries are directory.

6. SAME. *Quashing jury box. Grounds. Sufficient evidence.*

To warrant the court in quashing a jury box, it is not enough to show that it would be possible for names to be substituted for the list prepared by the supervisors, as required by Laws 1896, p. 93, ch. 84, but the testimony must show that a fraud was committed, or such flagrant violations of the jury laws as constitute fraud in law.

7. SAME. *Qualifications of jurors. Code* 1892, § 2355.

A juror, stating on his *voir dire* that he can try the case fairly and impartially according to the law and the evidence, and that his only information consists of what persons have told him, is a competent juror, within Code 1892, § 2355, making a person who will make oath that he is impartial in the case competent as a juror, notwithstanding his having an opinion.

8. SAME.

Where the jury for the term was drawn in violation of the statute, but without purpose on the part of the officers drawing the same to disqualify from jury service the persons drawn, and where accused demanded a special venire, which was granted, and drawn from the jury box containing the list of persons selected by the supervisors to serve as jurors, the refusal to quash the jury box was not prejudicial to accused.

FROM the circuit court of Calhoun county.

HON. JOSEPH T. DUNN, Judge.

Cook, the appellant, was indicted and tried for the murder of one Crawford, convicted of manslaughter, sentenced to the penitentiary for twelve years and appealed—his second appeal—to the supreme court.

The facts as to the killing of Crawford, for which appellant and his brother, Daniel, were jointly indicted for murder, are set forth in the report of the case of *Daniel Cook* v. *State,* 85 Miss., 738, 38 South. Rep., 110. Severance and separate

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Brief for appellant.

trials of the defendants were had, the appellant on his first trial being found guilty of murder and sentenced to the penitentiary for life, from which he appealed—his first appeal—and the judgment was reversed, and the cause remanded for a new trial. *Lon Cook* v. *State,* 38 South., 113.

Stone & Sivley, for the appellant.

The first assignment of error is, that the court erred in overruling appellant's motion to quash the jury box, and also erred in refusing to order the sheriff to summon another venire. The second assignment of error is, that the court erred in overruling appellant's motion to quash the special venire drawn from the jury box. We discuss these two assignments of error jointly. The testimony taken upon these motions discloses the fact, that more than fifteen days before the convening of the regular March, 1906, term of the circuit court, the clerks of the circuit and chancery courts, together with the deputy sheriff of the county, met for the purpose of drawing the juries to serve at said term of circuit court. These officers, after opening the so-called jury box, spread the slips containing the names of county electors upon the table, with the names exposed to view, and each one of the officers, in turn, after looking over the names, selected an elector to serve upon the jury. This process was repeated, until a sufficient number of names were selected to constitute the grand and the petit jury for the term of court. The motion to quash the jury box, also sought to quash the regular jury, drawn for that term of court, because the drawing was not in accordance with the directions of Code of 1892, ch. 68, as amended by acts of 1896, p. 93. Code of 1892, §§ 2366 & 2367, providing for the manner of drawing juries in vacation, was not observed in any particular. Under Code 1892, § 2358, and acts of 1896, p. 93, the board of supervisors of each county are required in making up the jury box, to apportion from each supervisor's district, the names to be placed in the jury box, in

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proportion to the number of electors in each district. The chancery clerk, Clements, testified that a regular number from each district of the county were placed in the jury box, although the five districts did not each have the same number of inhabitants. We, accordingly, submit that the jury box, as originally made up, was illegal, and should have been quashed. When the special venire was drawn from this illegally constituted jury box, and selection of the jury from this venire was made, appellant moved to quash the special venire, which motion was erroneously overruled. Code of 1892, §§ 2358, 2366 and 2376; Laws of 1896, p. 93; *Purvis* v. *State,* 71 Miss., 706, s.c., 14 South., 268.

This drawing of the jury, with the names of the jurors exposed and in full view, is clearly within the condemnation of this court in the recent decision of *Shepherd* v. *State,* 89 Miss., 147, 42 South. Rep., 544.

The testimony showed that the jury box was an old, wooden, ballot box, with a hole cut in it for the purpose of depositing votes, and a sliding top which could easily be adjusted without unlocking the box, and that the box was never kept sealed, thus, in its very construction, giving every opportunity for fraud. In fact, upon the hearing of the motion to quash the box, slips, containing the names of jurors, were removed from it while it was locked and supposedly intact. Whether there was, in fact, any fraud perpetrated upon appellant, we are unable to say, but we do strenuously insist that appellant's legal rights were recklessly disregarded, and if the three commissioners named had desired to commit a fraud, they would have had every opportunity so to do. The record shows that the sentiment of the county was very much wrought up over the killing which resulted in the indictment of appellant, and nearly a week was required in the examination of over three hundred venire men before a jury was finally secured. Under these circumstances, the appellant certainly had a right to ask that the jury box

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Brief for appellant.

be quashed, and that another special venire should be secured, in a method prescribed by law.

The third assignment of error is, that the court erred in refusing to sustain appellant's challenges for cause to certain jurors, Langston, Shippy and Reynolds, and required the appellant to challenge peremptorily these three jurors, when the testimony upon *voir dire* showed that they were each clearly disqualified to serve as jurors. At the time, appellant had, however, exhausted his twelve peremptory challenges. The juror, Langston, testified, that some time before the trial, he had heard from various sources about the killing, and, moreover, that a juror who had served on a former trial of the case, had told him what different witnesses at that trial had said the facts were, and, as a result, he, Langston, had formed a fixed opinion which would require strong evidence to remove. He practically stated that, if impaneled as a juror, he would enter upon the trial of the case with his mind made up, and it would so remain, unless the evidence was sufficiently strong to cause him to change his opinion, as he believed the facts which the juror told him had been stated on the former trial. While it is true, that Langston said that he had neither prejudice nor feeling in the case, and thought he could try appellant impartially, yet, he was clearly disqualified under the rule announced by this court in *Klyce* v. *State,* 79 Miss., 658, s.c., 31 South., 339. See also *Jeffreys* v. *State,* 74 Miss., 675, s.c., 21 South., 526; *Sheppric* v. *State,* 79 Miss., 740, s.c., 31 South., 416; *Fugate* v. *State,* 82 Miss., 189, s.c., 33 South., 942.

The juror, Shippy, testified that different persons told him the substance of what the witnesses for the state had testified to in the former trial of the case, and that one of these witnesses for the state, whose testimony was so detailed, was well known to Shippy as a reputable man who would tell only the truth. As a result of this, Shippy had already formed an opinion as to the guilt or innocence of the appellant.

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Brief for appellant.

As for the juror, Reynolds, he testified that he had an opinion which was based on the reports which he had heard in the past, and that it would take evidence to remove this opinion. He further stated, that as he was deaf, it was probable that he would not hear a portion of the testimony on the trial. From his having such an opinion, and because of his physical inability to hear freely evidence which was possibly necessary to change his opinion, we submit that he was an incompetent juror.

We do not think that the cases of *Gammons* v. *State,* 85 Miss., 103, s.c., 37 South., 609, and *Evans* v. *State,* 87 Miss., 459, cited by the learned assistant attorney-general to support his contention that the jurors were competent, are in point.

H. H. Creekmore, on the same side.

It is apparent, from the evidence introduced on the hearing of appellant's motion to quash the jury box, that the two clerks and the deputy sheriff, in drawing the juries for the term of the circuit court at which appellant was to be tried, pursued exactly the same method as was followed in the drawing of the grand jury which indicted the defendant in the case of *Shepherd* v. *State,* 89 Miss., 147, s.c., 42 South., 544.

It is contended by the learned assistant attorney-general that the selection of the petit jury in such manner did not constitute reversible error in this case, for the reason, that our jury laws are directory and not mandatory, and that, accordingly, appellant cannot complain of the illegality of the petit jury, inasmuch as he was granted a special venire at his request. Such contentions are not tenable, because, while our jury laws are directory, there must yet be some substantial compliance with the scheme of the law; and also because the appellant had the right to a choice between a special venire and a regular venire, legally drawn and impaneled. It was a violation of the rights of appellant to take from him his right to be tried by a regular venire, if he so chose. Yet the action of the jury com-

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Brief for appellee.

missioners, in drawing what purported to be a regular venire in violation of the statute, precluded the appellant from exercising such choice.

It is further submitted, that the jury box was not a legal jury box. If we waive the question whether the jury box as originally made up by the board of supervisors was legal, we still have presented the question whether, after the opening of the box by the two clerks and the deputy sheriff, the spreading of the names upon the table, and the examination of the same, the box continued to be, in contemplation of law, a legal jury box.

Eighty of the slips containing names were illegally taken from the jury box in the method prescribed, thus leaving the jury box practically robbed of two-fifths of the names originally placed in it. It is true, that the same number of names would have been taken from the jury box if the drawing had been done legally, but not the same names as would have been drawn, had the officers proceeded under the strict requirements of the statute law. Appellant was accordingly not given a legal trial. *Nealon* v. *People,* 39 Ill. App., 481.

The importance to the appellant of being presented with a jury box and a jury in every respect legal, is emphasized by the fact that it was exceedingly hard to procure a trial jury of any sort, almost a week being spent in the impaneling of the petit jury.

George Butler, assistant attorney-general, for the appellee.

The motion to quash the jury box, and requesting an order to the sheriff for the summoning of a special venire, was properly overruled. The law presumes that all officers perform their duty. Code 1892, § 2358, provides that the board of supervisors shall take the persons "as nearly as they conveniently can from the several supervisors' districts in proportion to the number of qualified persons in each." Appellant did not contend that this was not done, the only testimony throw-

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ing light upon the matter, being the statement of the chancery clerk, Clements, that there were the same number of electors from each supervisor's district.

That part of the motion asking for the quashing of the *venire facias* for the first week of court, should have been overruled, as well as that part of the motion seeking to quash the special venire. No challenge to the array can be sustained, except for fraud. Code 1892, § 2387.

In *Campbell* v. *State,* 17 South. Rep., 441, the venire was drawn from an old box which had been prepared in 1902, notwithstanding the fact that a legal box had been prepared in 1904. This court held in that case, that the failure of the lower court to overrule the motion to quash, was not error.

No contention is here made by learned counsel for appellant, that any actual fraud was perpetrated, or in any way attempted against the rights of the appellant. It is no ground for reversal to allege that there was merely an opportunity for fraud. Such might truthfully be said of almost any business transaction, but no one would think of holding, that because there was merely an opportunity, not shown to have been acted upon, the transaction was vitiated. The laws are not intended solely for the protection of the accused. "It is, of course, of vital importance that cases be investigated by a fair and impartial grand jury and be tried by a fair and impartial petit jury, but beyond and above this the laws are intended to subserve the public welfare, and upon nothing is the public welfare more dependent than an unfaltering, strict and impartial enforcement of the criminal law." *Posey* v. *State,* 86 Miss., 147, s.c., 38 South., 324.

The verdicts of juries, and the judgments of courts, ought not to be set aside on slight or flimsy pretexts. In the *Posey case, supra,* it was contended that a fraud in law, if not in fact, was perpetrated by the conduct of the judge in adding a grand juror, but this court refused to adopt that view.

The case of *Shepherd* v. *State,* 89 Miss., 147, s.c., 42 South.,

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Brief for appellee.

544, does not sustain appellant's views here. In the case cited there was no challenge to the panel or to the array, but an objection to the "method of selection," rather than the "drawing" of individual jurors at a time when any error that might have been committed, could be corrected. Had a motion been made to quash the panel, in the case cited, we submit, that it should not have been sustained.

Learned counsel for appellant seem to contend, that because certain jurors were selected by the clerks and deputy sheriff, rather than drawn in the method prescribed by law, the whole venire was thereby rendered illegal. Yet, as above stated, in the absence of faud, we submit, there was nothing prejudicial to the rights of appellant in this. The jury, thus selected, were free and impartial, and obeyed the instructions of the court, in rendering their verdict. Hence, there is no good reason why the appellant should have objected to the regular venire for the first week, and have been thereby compelled to ask for a special venire. He, himself, raised the question as to the legality of the regular venire, and asked for the summoning of the special venire, and inasmuch as the special venire thus procured, was perfectly free and impartial, appellant is in no position to complain. *Russell* v. *State,* 53 Miss., 367.

The jurors, Langston, Shippy and Reynolds, were competent, and there was no error in overruling the peremptory challenges as to these jurors. The case of *Jeffries* v. *State,* 74 Miss., 675, s.c., 21 South., 526, and *Sheppric* v. *State,* 79 Miss., 740, s.c., 31 South., 416, relied on by appellant, have no application here. In each of these cases, the jurors concealed from the court on their *voir dire* that they had an opinion, and stated to the court that they were perfectly free and impartial, when, in fact, on a motion for a new trial, it was shown that a short while before being accepted as jurors, they had expressed an opinion to the effect that the defendant was not justifiable in killing the deceased.

The decision in the case of *Klyce* v. *State,* 79 Miss., 652,

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Opinion of the court.

s.c., 31 South., 339, is not in point, the decision being limited to the particular facts in that case, as will be seen from the opinion. In the case of *Fugate* v. *State,* 82 Miss., 189, s.c., 33 South., 942, the jurors there announced, upon their *voir dire,* that they were prepared to decide the case without further testimony, and on what they had heard. We think that this case is controlled by *Gammons* v. *State,* 85 Miss., 103, s.c., 37 South., 609, and *Evans* v. *State,* 87 Miss., 459.

Argued orally by *C. L. Sivley,* and *H. H. Creekmore,* for appellant.

MAYES, J., delivered the opinion of the court.

We shall not undertake to follow out and discuss each of the errors assigned by appellants, for the reason that many of them are so clearly answered in the record against the contention made that we deem it unnecessary. We shall only discuss the serious questions raised in argument of counsel.

The first error assigned to which we address our attention is that which involves the method in which the jury were drawn from the jury box, who were to serve as jurors during the term of court at which appellant was to be tried. Appellant moved the court, after the special venire which had been summoned was exhausted, to set aside the regular jury which had been drawn, because of the illegality of the manner in which they were drawn by the officers charged with this duty under § 2367, Ann. Code 1892. Clements, the chancery clerk, participating in the drawing of this jury, says that the jury box was brought in and placed on the table. It contained five small boxes on the inside, from which they were to draw the jury list. He says he took the boxes out, one at a time, poured the names on a table, and turned the faces of the slips up so that he could see the names and know who the jury would be for that term of court. Every person selected was known beforehand, and this method of selecting the jury was

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continued throughout, until the entire list had been selected to serve at this term of the court; that he only selected such names as he thought would do well to serve on the jury; that they drew no names from the boxes without knowing who they were placing on the jury. He was asked the question: "Did you pick the parties you wanted?" A. "Certainly. That is what it was done for." He was further asked this question: "When you turned the jury box out so you could get the names on the jury, did you turn the names up intentionally, so you could see the names of the men?" A. "Yes, sir; that is the way we have always been doing since I have been here." Q. "Did you pick the parties you wanted?" A. "Certainly; that is what it was done for." Q. "You got the ones you wanted, Mr. Johnson got the ones he wanted, and Mr. Ramsey did likewise, did he?" A. "I could not say as to them. I got the ones I wanted." Ramsey, the circuit clerk, was then introduced as a witness, and he corroborated Clements, in that he says he knew when he took the names from the box whom he was drawing, and where they lived, and all about them, and that that is the way this jury was drawn. Johnson is the next witness introduced, and he testifies to about the same thing, with reference to the selection of the jury for this term of court, as is testified to by Clements and Ramsey.

This shows the manner in which the jury was selected. Now, let us compare the methods used by the sheriff, the chancery clerk, and the circuit clerk, in drawing the jury that was to serve at this term with the requirements of the law. The legislature has been very careful to guard the manner of selecting jurors in such way as that it is largely a matter of chance as to who shall compose the jury at any term of the court, and we must suppose that the legislature did this for just and wise reasons. If this manner of selecting jurors could stand, there is no need for law upon this subject; but the statutes may be repealed, and the sole discretion as to the selecting of fit and competent jurors committed to the sheriff

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and clerks of the county. It was never intended that the power of determining who was and who was not fit for jury service should be committed to the judgment of those charged with the duty of drawing the jurors from the jury box for service during a term of court. The guarding of the method by which jurors shall be selected has been a subject of great care by the legislature. By Laws 1896, p. 94, ch. 84, § 1, it is provided that "the board of supervisors at the first meeting in each year, or at a subsequent meeting if not done at the first meeting, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms held more than thirty days afterwards, and as a guide in making the list they shall use the registration books of voters and select a list of names of qualified persons of good intelligence, sound judgment, and fair character." By this first provision the board of supervisors are required to make a selection of jurors who are to serve at the next ensuing two terms, and in making this list they are required to use the registration books, and to them, in making up their list, is committed the power to select from the list of names qualified persons of good intelligence, sound judgment, and fair character; and this is the only place in the law upon the subject of juries where it is given to anybody to make a selection of persons who are to serve as jurors, and this power is given to the board of supervisors in a very limited way, being safely guarded by requiring them to prepare a list of not less than two hundred, and committing the actual selection of the jury to a different body. By section 2 of this act it is provided that "at each regular term of the circuit court, and at a special term if necessary, the judge shall draw in open court, from the five small boxes inclosed in the jury box, slips containing the names of fifty jurors, to serve as grand and petit jurors for the first week, and thirty to serve as petit jurors for each subsequent week of the next succeeding term." The judge is not given the power by this section to select from the list prepared by the board of supervisors as provided above such men as

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may suit him, but he is required to draw from the five small boxes the names of parties who are to serve as jurors. Thus in this section it is seen that the judge has no power to select, but must draw the names as he comes to them. In sec. 4 (p. 95) of the same act, in providing how grand jurors shall be drawn, it is provided that "the name of each juror shall be written on a separate slip of paper, and the name of each supervisor's district shall be placed in a separate box, hat, or compartment in open court, and there shall be drawn out by a person designated by the judge the number directed by the court." By § 2359, Annotated Code 1892, it is provided "that the jury list prepared by the board of supervisors, from which the jury who are to serve are to be drawn, shall contain not less than two hundred nor more than five hundred names, unless the judge of the district shall direct a greater number to be put on the list." By sec. 2360, after the list has been prepared by the board of supervisors, it is directed that it shall be immediately delivered by the clerk of the board, to the clerk of the circuit court, and by him carefully filed and preserved as a record of his office, and any alteration thereof shall be treated and punished as provided in case of the alteration of a record. By sec. 2361 it is provided that "the names of persons on the jury list shall be written on separate slips of paper by the clerk of the circuit court, and put in a box kept for that purpose, marked jury box, which shall be securely locked and kept closed and sealed except when opened to draw jurors."

It will be seen, upon a review of the entire law bearing upon this subject, that the legislature has been very careful to prescribe the method for the selection of juries, so as to take away from every person, or set of officers, the possible power of appointing the body of men who are to try any person's cause. Thus, to recapitulate, when the board of supervisors prepare the jury list, from which the jury is to be made up, by the act of 1896 referred to above, they shall select the list of names from the registration books and place upon the list persons of

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good intelligence, sound judgment, and fair character. By sec. 2 of the above act, when the judge draws the jury, he is required to draw the names in open court, and is prohibited from disclosing the name of any juror. By sec. 4 of the act, when the grand jury is to be selected for the term, the names of all the jurors from each supervisor's district are written on a separate slip of paper and placed in a separate box, containing the names of the jurors from each supervisor's district, and in open court the names of such as are to compose the grand jury are drawn out, not by the judge, but by some person designated by him for the purpose. By § 2367 of the Annotated Code 1892, on failure of the judge to draw the jury as provided in sec. 2 of the act of 1896, the sheriff, chancery clerk, and circuit clerk are given the power to draw the jury. This high trust is confided, not to one of them, but to the three highest officers of the county, for the express purpose of having each see to it that the method of securing a fair and impartial jury is not violated. Can it be contended that the great care and caution thus shown by the legislature to secure to litigating parties a fair and impartial jury is but a matter of aimless circumlocution, and not a matter of cautious and careful guarding of a sacred right? Can it be argued, in the face of so cautious and careful guarding of the jury system by the legislature as is shown by the laws they have enacted to perfect a system for the procurement of a fair and impartial jury, thereby to protect the life, the liberty, and the property rights of the citizen, that all this law is to be stricken down by § 2389 of the Annotated Code of 1892, which declares that "all provisions of law in relation to listing, drawing, summoning, and impaneling juries are directory merely"? We cannot so decide. It was intended by the legislature to carefully and sacredly guard the right that each litigant had to have his cases heard by a fair and impartial jury, selected from the body of the county and in a fair and impartial way. No man, or set of men, under the law as it is written, have any power to de-

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termine the fitness of a party to be drawn as a juror when his name has been placed in the jury box by the board of supervisors. The law is careful to require that a large number of names be placed in the jury box, from which the jury are to be drawn, the very purpose of which was to secure litigating parties against the possibility of having any person place upon the jury such persons as he might deem proper in any case. It is of the very essence of the purity of the jury system that this method be followed as directed by the legislature, to the end that no unfairness can possibly take place in the selection of juries. We would not affirm any case, either civil or criminal, where the verdict was rendered by a jury selected as this one was, if there had been a timely challenge. To do so would be to crush out the spirit of the jury system, and to establish a rule that would place litigating parties at the mercy of the honesty and wisdom of the parties who drew the jury.

We desire to say that in the history of this court there has never been a record brought to the court disclosing a more flagrant violation of the law with reference to the selection of jurors than is presented in this case. We feel it to be the duty of the court to make this comment in the light of this record, to the end that such practice and such method may be put an end to. It is evident from the record that the officers charged under the law with the duty of selecting the jury to serve during the term of this court, intended no wrong, but the practice indulged in by them, if sanctioned, would destroy the sanctity of a jury trial and make the administration of the laws under the jury system farcical. The constitution declares "that the right of trial by jury shall remain inviolate," and the legislature has undertaken to carry out this declaration of the constituion by guarding the manner of the selection of the jury in every way possible, to the end that a fair and impartial jury may be secured, and their selection not be intrusted to a single individual, or individuals.

But in this case the defendant has suffered no prejudice be-

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cause of the illegal way in which this jury was selected, and therefore this case should not be reversed. We will proceed now to show why appellant was not prejudiced by the illegality above referred to. The record shows that when the case was called for trial appellant asked for a special venire. This special venire was granted and duly summoned, and after exhausting the special venire, when under the law it became the duty of the judge to call the jurors summoned for the week, the judge sustained a motion to quash the panel drawn for the week, and declined to let any jurors from the regular panel be put on the jury to try defendant, and directed the sheriff to summon from bystanders a sufficient number of good and lawful citizens of the county, duly qualified voters, to complete the panel to try the case. It will be seen from this that the court used in the trial of this case none of the jurors selected in the manner which is hereby declared to be illegal, but upon the application of appellant in the first place summoned a special venire, and, when this was exhausted, ignored the regular panel and ordered the sheriff to summon in bystanders. Therefore appellant was in no way prejudiced by the illegal manner in which this jury was selected by the officers selecting the jury to serve at this term of court. He was not indicted at this term, but was indicted some three years before; that is to say, in 1903, by a different jury. And as to the jury which indicted him there is no objection urged, so that none of these jurors participated in any way in the indictment or trial of appellant, and he cannot, therefore, claim to be prejudiced by this illegal method of selecting a jury.

We now come to the next question involved in this case; that is, as to the motion to quash the jury box prepared by the board of supervisors, from which the special venire was drawn who were to try this case. The case of *Purvis* v. *State,* 71 Miss., 706, 14 South., 268, cited by counsel for appellant, has no application here. It is shown in the *Purvis case, supra,* as stated in the opinion of the court, "that the board of super-

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visors had, through their ignorance or obstinacy, disregarded the mandate of § 2358, Ann. Code 1892, in preparing the jury list from which the jury box was to be made." There is no such question presented here. It is clearly shown that the board of supervisors, in compliance with sec. 1, ch. 84, p. 94, of the laws of 1896, had prepared, at its first meeting in the year 1906, a list of persons to serve as jurors in the circuit court. It is true that the box in which these names were placed may not have literally corresponded with the requirements of the law, but it does in all substantial matters. It is shown that this box was an old ballot box with a sliding top, and that inside this box were placed five little boxes, in which the names of the respective jurors for the different supervisors' districts were placed, and that these little boxes did not have tops on them; but the hole in the ballot box was sealed with a paper cover, and the box was kept locked, and there was such a substantial compliance with the law as is contemplated by § 2389, Ann. Code 1892, providing that "all provisions of law in relation to the listing, drawing, summoning, and impaneling of juries are directory merely."

It is also objected to that the jury list was prepared by the sheriff and clerk of the chancery and circuit courts more than fifteen days before the term of court convened, when the law provides that the selection shall be made within fifteen days of the term of court; and this is urged as a reason why this jury should be quashed. As we have shown above, the jury selected at this time had nothing to do with the trial of appellant in the first place, and in the next place this is but another irregularity which is fully covered by the section of the code above quoted. This section of the statute—that is to say, sec. 2389—was enacted to prevent the selection of jurors from becoming vitiated by such irregularities. It was not intended by the legislature, however, that fairness in the selection of jurors should not be preserved; and whenever there is an invasion of this right, and whenever unfairness in the method of

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securing jurors is shown to exist, a substantial right of the litigant is invaded, and this court, notwithstanding sec. 2389, which is merely aimed at irregularities, and not intended to cover up deliberate violation of the law, will set aside the verdict of any jury deliberately selected in a manner that is in violation of the law, whenever there is timely objection made by a party in either a criminal or civil proceeding.

This case is fully covered by the case of *Campbell* v. *State* (Miss.), 17 South,, 441, and in many respects is very similar to it, and the court properly overruled the motion to quash the jury box. In order to warrant the court in quashing a jury box, it is not enough to show that it would be possible for names to be substituted for the list prepared by the board of supervisors; but the testimony must in fact show that a fraud has been committed, or show such flagrant violation of the jury laws as that the acts proven would constitute a fraud in law. The attention of the officers of Calhoun county having been directed by the decision of this case to the many irregularities existing in their method of selecting juries, it is to be hoped that the errors complained of in this record will not be repeated, or longer continued in existence. If they are, there is a remedy under the criminal laws of the state.

The next assignment of error is that the court erred in refusing to sustain challenges for cause to Jurors Langston, Shippy, and Reynolds, thereby forcing appellant to peremptorily challenge the jurors. We have most carefully read the record containing the examination of these jurors, who it is charged were incompetent, and we have examined all of the authorities cited by counsel, and are unable to say that the action of the judge was incorrect in refusing to set aside these jurors for cause. In his direct examination Langston states positively that he has no opinion in reference to this case, and that there is no reason existing, that he knows of, to prevent him from doing absolute justice between the state and the defendant, and giving defendant a fair and impartial trial. Counsel for appellant

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in his cross-examination succeeds in showing that this juror had heard one Pryor, a former juror, talk about the case, and Langston states that Pryor made an impression on his mind in reference to the case; but on reviewing his entire testimony, taking all that he said together, we are unable to say that the action of the trial judge in refusing the challenge for cause was not correct. Langston states that, if taken on the jury, he could try the case fairly and impartially according to the law and the testimony, and that his only information consists in what he heard Pryor say and in rumors. His answers are frank and fair, showing no bias in any way whatever, and he repeats that he is perfectly impartial and can give defendant a fair trial. The same thing characterizes the testimony of Juror Shippy, who says that he can give the defendant a fair and impartial trial, and, though he has heard many rumors of the case, he has heard none of the testimony, and that the rumors which he has heard will not be allowed to enter into or be considered by him, in determining the guilt or innocence of the defendant. Shippy states that he would try him according to the evidence adduced in the case, and would not try him in any other way; that he has no fixed opinion about it. Juror Reynolds' testimony is along the same line, and we are impressed with the belief, after carefully reading the examination of these jurors, that the action of the circuit judge in refusing to challenge these jurors for cause was not error. In a case of this notoriety, it would be strange indeed if there existed many qualified voters in the county of Calhoun who had not heard of this killing. It is only essential to the securing of a fair and impartial trial that a juror be able to discard the rumors which he may have heard, or the hearsay testimony, and be governed by the testimony adduced at the trial, and this these jurors have said they could and would do.

In the case of *Gammons* v. *State,* 85 Miss., 103, 37 South., 609, Justice TRULY, delivering the opinion of the court, in an able and exhaustive discussion reviews all the authorities on

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the subject of the competency of jurors, and in the light of this case we feel that it would be idle to again enter upon a discriminatory discussion of this subject. After a review of all the authorities of our court on this subject, he says: "An examination of the former opinions of the court on this subject simply serves to demonstrate the futility of all effort to frame any definite rule to be followed in passing upon the competency of jurors. The only general proposition really deducible from these opinions is that the decision in every instance must depend on the varying circumstances of the particular case. In determining the question of the competency as a juror, the court is not bound by the oath of impartiality made by the juror, for no juror can constitute himself the judge of his own competency, but should take into consideration the demeanor of the proposed juror; his answers, as indicating candor, or a desire to evade the question or conceal the truth; the impression or opinion which has been formed or expressed; the extent of knowledge of the facts of the case; the sources from which the information came—and from these, and from the many intangible, yet potent, elements which constitute personality, decide upon the existence of bias or animus either for or against the accused." In the language of the court in the *Gammons case, supra,* the question of the competency of a juror "in every instance must depend upon the varying circumstances in each case." The force and truth of this statement is readily seen when the authorities of our own state are examined and sifted. In the light of this record we cannot say that the circuit judge was wrong in holding that Jurors Langston, Shippy, and Reynolds were competent jurors. In the case of *Sam* v. *State*, 13 Smed. & M., 189, it was said that "every case must depend in some degree upon its own peculiar facts. Circumstances may exist which render a departure from the rule necessary and unavoidable, which in a different state of case would be inflexibly adhered to. In some cases of great notoriety and of general concern it might be impossible to find men in the

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vicinage who had not formed some opinion of the matter." It would hardly be possible to find many qualified jurors in Calhoun county who had not heard more or less of this case. We think the testimony of these jurors clearly brings them within the provisions of § 2355 of the Annotated Code of 1892, and that the testimony fails to show that these jurors had any such opinion as disqualified them as jurors. As was said in the case of *Posey* v. *State,* 86 Miss., 141, 38 South., 324: "It is vitally important that the cases be investigated by a fair and impartial grand jury, and be tried by a fair and impartial petit jury; but beyond and above this the laws are intended to subserve public welfare, and upon nothing is the public welfare more dependent than an unfaltering, strict, and impartial enforcement of the criminal laws." We are constrained to say that this defendant was granted a fair and impartial trial.

We do not deem it necessary to notice any other assignment of error in this case. The court was liberal in the granting of its instructions, and we see no error committed in them in any way.

Finally, it is argued by counsel for appellant that the jury box from which the special venire was drawn should have been quashed, for the reason that the action of the officers charged with the duty of selecting the jurors from the box was illegal, and therefore to the extent that they drew names from the box they disqualified the names of persons whom the defendant had a right to have in the box; that the withdrawal of these names lessened his chances of procuring the same jury that he would have had if these names had been left in there. This contention is good metaphysics, but too refined to be applied to the practical administration of law. Every man whose name is in the jury box is subject to jury duty. No person on trial has a vested right in any particular juror. He has an interest in seeing to it that the jury are selected according to the forms of law, and that a jury is not selected because it is for or against a particular litigating party. The illegal taking out of this

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jury did not vitiate this jury box, it being in all other respects lawful. No man has a vested right in any particular juror, nor in any particular number of jurors in the box. The original number required by law is two hundred names, and at the first term of the court this number may be reduced to fifty or sixty, by drawing special venires and otherwise. It would not be argued that because these names were taken out the remaining ones were not qualified jurors, or that a party being tried would have any cause to complain because there was not the original two hundred in the box; neither does it vitiate the box because eighty names may have been unlawfully taken out. The remaining ones are competent. If there was any testimony in this record from which it might be reasonably inferred that it was the purpose of taking out these names in order to thus disqualify those taken out, and that the names left in the box had been selected and purposely left in the box in order that they might constitute the jury, a different question would be presented; but this is not the case here, nor is there any such proof. The officers picked the names out of the box that they wanted on the jury, but did not molest the other names that the board of supervisors had placed in the box as qualified jurors. Criminals are not to be tried on the doctrine of chances, or on metaphysical discussions of the law, but upon the facts in their case. All that they can ask is a fair and impartial trial before a fair and impartial jury. The case of *Nealon* v. *People,* cited in 39 Ill. App., 481, is a case from a subordinate court, standing pretty much alone in the rule it announces, applied to its interpretation of its own statute, and is too refined in its discrimination for practical use. *Commonwealth* v. *Valsalka,* 181 Pa., 17, 37 Atl., 405; *Rolland* v. *Com'rs,* 82 Pa.. 306, 22 Am. Rep., 758; *Sumrall v. State,* 29 Miss., 202; *Head v. State,* 44 Miss., 731; *People* v. *Coffman,* 59 Mich., 1, 26 N. W., 207; *State* v. *Hensley,* 94 N. C., 1021; *People* v. *Jackson,* 111 N. Y., 362, 19 N. E., 54. The authorities cited above, including the cases

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from our own state, amply sustain the above announcement of the law.

Affirmed.

WHITFIELD, C. J., delivered the following dissenting opinion:

There are many assignments of error in this case, which it is not necessary to notice, beyond saying that there is no reversible error predicable of the giving or refusal of instructions, nor in respect to the admission or rejection of testimony. The verdict of the jury should not be disturbed because of any of these assignments.

But there are two assignments which manifestly ought to be sustained. The first is the assignment that the court erred in overruling the motion to quash the jury box. The record shows that the motion to quash the jury box was made and acted on when the court was "about to proceed to draw a special venire" from which to select the jury to try the defendant, having correctly quashed the regular venire of eighty names for the first two weeks. This regular venire consisted of fifty names from which the grand jury and the petit juries for the first week were to be taken, and thirty names from which the petit juries for the second week were to be taken. I can add nothing to the plainness and clearness with which my Brother MAYES has set out the extraordinary and utterly illegal method pursued by the two clerks and the sheriff in procuring these eighty names from the jury box. As he has stated, the very essence and soul of the jury law is that the names taken from the jury box to constitute the grand and petit juries shall be wholly drawn by lot, not picked or selected according to the whim and fancy of the clerks and the sheriff. Nor can I add anything to the earnest and most emphatic condemnation by my brethren of this method practiced, as set out in the opinion in chief, in making up these eighty names, as utterly illegal. I quote a passage from the opinion in chief, heartily to indorse

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it. That opinion says: "Can it be contended that the care and caution thus shown by the legislature to secure to litigating parties a fair and impartial trial is but a matter of aimless circumlocution, and not a matter of cautious and careful guarding of a sacred right? Can it be argued, in the face of so cautious a guarding of the jury system by the legislature as is shown by the laws they have enacted to perfect a system for the procurement of a fair and impartial jury, thereby to protect the life, the liberty, and the property rights of the citizen, that all this law is to be stricken down by § 2389 of the Code of 1892, which declares 'that all provisions of law in relation to the listing, drawing, summoning, and impaneling of juries are directory merely'? We cannot so decide. It is of the very essence of the purity of the jury system that this method be followed as directed by the legislature, to the end that no unfairness can possibly take place in the selection of juries. If this manner of selecting jurors could stand, there is no need for law upon this subject; but the statutes may be repealed, and the sole discretion as to the selection of fit and competent jurors committed to the sheriff and clerks of the county." And again the court correctly said: "It was not intended by the legislature, however, that fairness in the selection of jurors should not be observed; and whenever there is any invasion of this right, and whenever unfairness in the method of securing jurors is shown to exist, a substantial right of the litigant is invaded, and this court, notwithstanding sec. 2389, which is merely aimed at irregularities, and not intended to cover up deliberate violation of the law, will set aside the verdict of any jury deliberately selected in a manner that is in violation of the law, whenever there is timely objection made either by a party in a criminal or civil proceeding." It will thus be seen that the court with great care and precision has accurately drawn the distinction, with respect to sec. 2389, between mere irregularities and the violation of the fundamental statutory provisions. It has declared in this case, as it was in the

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case of *Sheppard* v. *State* (Miss.), 42 South., 544, that the making up of the grand or petit juries by picking the names—by intentionally selecting the names—according to the whim and fancy of the judge, or the clerks and the sheriff, and not drawing them by lot, so as to secure the fundamental purpose that the names of those who are to serve as grand and petit jurors shall not be known, is an outrageous violation of the provisions of law guarantying a fair and impartial jury trial, and not an irregularity covered by sec. 2389.

In all this I heartily concur, and most thoroughly indorse all that was said on this subject, both in the *Sheppard case* and in the opinion in chief in this case; but the remarkable thing to my mind is that the court, after thus clearly and emphatically announcing that there has been in this case a gross violation of the guaranty of a fair jury trial arising out of the selection instead of the drawing by lot of the eighty names, then strangely holds that this appellant was in no way prejudiced by this violation of the guaranty. The reason given by my brethren for that to me very singular holding is that none of the eighty men so selected served upon the jury trying this man, because the court quashed the regular venire for the two weeks, and defendant was indicted at a former term of the court by a different grand jury. But what possible aid can be derived from that fact, when the other inescapable facts stare us in the face that the one hundred and twenty names left in the jury box by the two clerks and the sheriff were, of course, just as clearly and indisputably selected and picked to be left as the eighty names taken from the jury box were selected and picked out of which to constitute the grand and petit juries? There is no possible escape from the logic of the proposition that the selection and picking of the eighty names tainted the whole jury with the vice of the selection and the picking, so that the one hundred and twenty names left were as much picked and chosen to be left, instead of having been left by lot, as the eighty picked and chosen to serve were picked and chosen out of which

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to constitute the juries. When the special venire of fifty was taken from the one hundred and twenty names thus picked to be left in the jury box, and some of the jury who tried this man were taken from that special venire, and the appellant was compelled to exhaust three peremptory challenges on three of these fifty names constituting the special venire, the members of the jury actually trying this man were thus in part a portion of the special venire of fifty, and so part of the one hundred and twenty left by selection, and not by lot, in the jury box, and were just as indisputably picked and selected jurymen as the eighty were picked and selected. There is no logic on earth which can escape this inevitable conclusion of correct reason. To state it so as to present the crux of the issue, so as to show precisely wherein the appellant was vitally prejudiced in the trial, we have but to note the self-evident proposition that the panel which tried him was not the same panel which would have tried him if the one hundred and twenty names had been left in the jury box by lot; and can it be possible to defend the proposition that when it is thus made perfectly clear that the panel which actually tried him is not, because of the one hundred and twenty having been left in the jury box by selection and not by lot, the same panel which would have tried him had the law been observed and the one hundred and twenty left in the jury box by chance, nevertheless the jury was a legally selected jury. My brethren concede that the court correctly held that the regular venire of eighty names should be quashed. Why? Because they were selected, picked, not drawn by lot. Does not the same identical reasoning require the quashing of the box with the one hundred and twenty left in it, also by selection and picking, and not by lot? The very soul, the very essence, the very fundamental conception of the law is that the jury that tries one for his life shall be a jury wholly drawn by lot; and yet it is perfectly plain, from the record, that that part of this jury which was taken from the special venire of fifty, which fifty were taken in turn from the one hundred and

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twenty left in the jury box by selection, was a part selected and picked, and not drawn by lot. Something is said in the opinion to the effect that the large number of names put in the jury box cures this. To my mind this is a patent fallacy. Take any two hundred names, or, for that matter, any one thousand names, put in the jury box, and select, as was done here, two-fifths of them by picking them to serve, and you necessarily inescapably, by the self-same act, pick also the three-fifths left to remain in the jury box. It is impossible for me to understand how my brethren fail to see that this is so. The picking and selecting of those that are left is necessarily involved in the process of selecting part to serve, and the whole jury box is thus vitiated by the method of selecting, which makes the entire jury box one not a jury box within the contemplation of the law, as was expressly held in *Purvis* v. *State,* 71 Miss., 706, 14 South., 268. The court held, in the *Purvis case,* that the whole jury box was void because of the wilful violation of the law by the board of supervisors, and no jury, and no part of the jury, was taken from that box in that case. So here the whole jury box is vitiated by infecting the whole of the two hundred names with the vice of selection and no jurymen could legally have been taken from that selected box to try this man without violating the legal guaranty.

The case of *Campbell* v. *State,* 17 South., 441, is upon a wholly different proposition, not involving the question of selection at all, and its citation is *malapropos* here. The precise question has been squarely presented and squarely decided in two cases. *Ferris* v. *People,* 35 N. Y., 129; *Nealon* v. *People,* 39 Ill. App., 481. This last case is on all fours, as to this proposition, with the case at bar. In the *Nealon case* there was a challenge to the array of the petit jury. It was shown in evidence that the jury list was made up by each of the members of the board presenting a list of names supposed to represent ten per cent of all the legal voters in the township or precinct represented by such members, in all nine hun-

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dred and fifty-seven names; that these names were copied in a book by the county clerk kept for that purpose; that all of these names were then copied upon cards, one name on each card, and all said cards were placed in the jury box, from which box the panel of thirty jurors required for the term was drawn. Sec. 2 of that act (Rev. St., ch. 78), provided that the board should, from that list, make a second list by selecting from the first list a number of names equal to one hundred for the trial term of the circuit court, and in making this second list, or sublist, the board should take into consideration four qualifications not required in making out the first or ten per cent list, and that the board should check off from the ten per cent list the names of those selected to form the sublist, and the names upon the sublist should not again be selected as jurors until every person selected upon the ten per cent list to serve as a juror had been selected, or until the expiration of two years from the time of making the original list, when a new list should be made. The law further provided that this sublist should furnish the names to be written upon separate tickets, and placed in a box from which the jurors were to be drawn. The county board failed to obey the law requiring this sublist to be prepared from which the jury were to be drawn, and the contention was precisely, as here, that in this way the body from which the jury were to come was changed, and necessarily the jury which actually tried the defendant was a different jury from the jury which would have tried him, had the law been observed, and the jury drawn from the sublist, instead of from the original list, and the court said: "It therefore becomes necessary to determine whether the failure by the county board to obey or notice the section requiring a second sublist to be prepared is such a mere irregularity as could reasonably be said to work no positive injury to plaintiffs in error. . . . If the language above quoted from the supreme court means that in all cases an accused person, who has unsuccessfully challenged the array of jurors, must,

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before he can successfully assign error upon the action of the court in overruling his challenge, show that some positive injury has been done him by the failure or irregularity, then any of the provisions of the jury law might be violated, and the accused could not be heard to complain. If a jury had been selected by the sheriff to try plaintiffs in error entirely without and against law, it might be that those selected had all the qualifications required by law, were good men, and had given plaintiffs in error a fair and impartial trial, and therefore they could not complain. We do not understand the supreme court to mean this, but that the irregularity complained of must be of such a character as would probably have produced a change in the panel, or presented a list of names to choose from different from those which would be produced by a compliance with the law. It is the right of an accused to have a jury selected in compliance with the law, and any substantial and material departure from the methods pointed out by the statute is certainly a wrong to him, of which he has a right to complain. The failure of the county board to select from the original or ten per cent list the sublist required by sec. 2 was, we think, a substantial departure from the law which would work a positive injury to the accused. The original list contains the names of voters without any reference to any of the qualifications of jurors required by sec. 2, except the first; *i. e.*, that they shall be inhabitants of the town or precinct. In making the second or sublist, the county board are required to exercise their judgment, and to use their personal knowledge of the men of their precinct, to present names of those only who are of the age of twenty-one years and under sixty, in the possession of their natural faculties, not infirm or decrepit, free from all legal exceptions, of fair character, approved integrity, sound judgment, well informed, and who understand the English language. The sifting of the original list by the members of the county board is not a mere useless form, but an important duty they owe to the public, and one which they cannot omit with-

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out materially lowering the character and intelligence of those composing the juries of the county. The failure of the county board to perform their duty, in all human probability, presented to the accused in this case an entirely different panel of jurors from those which should have been presented, had the law been complied with. It is almost impossible to suppose that thirty names drawn from a box containing the nine hundred and fifty-seven names on the original list would be identical with those drawn from a box containing the names only of the sublist. The omission to observe the provisions of sec. 2 has therefore resulted in the selection of the jury from an entirely different class of men than that intended by the law, and did, in all human probability, present to plaintiffs in error different individuals to choose a jury from than would have been presented had the law been complied with. The true rule, we think, is laid down in *Ferris* v. *People,* 35 N. Y., 129, where it is said: 'The question arises whether any injury has resulted to the prisoner, or has he been prejudiced thereby? If we could see by any possibility that this neglect of duty on the part of these officers could have changed the panel, or in any manner have produced a different result, we might hesitate whether the prisoner should have a new trial.'"

If I understand the processes of logic and sound reason, there can be no escape from the conclusiveness of this reasoning. To my mind it is as clear as noonday that the panel which tried this man was, in part, a panel different from the panel to which he was entitled, if selection had not been resorted to and the jury had been chosen by lot. How can it possibly be said that a defendant, on trial for his life, is not denied the legal guaranty of a fair and impartial jury, when part of the jury trying him is a jury selected and picked according to the whim and fancy of the clerks and sheriff, and not drawn by lot according to the law? This error is, as the court correctly holds, not an irregularity curable by section 2389. It is vital. It goes to the violation of the legal guaranty. It is

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a square overthrow of the fundamental spirit and purpose of the law itself. I may add, in passing, that the law required the board of supervisors, in making up the jury box, to apportion the names placed therein from each supervisor's district according to the number of electors in each. The testimony in this case shows clearly that an equal number from each district of the county was put in the jury box, although the districts did not have the same number of inhabitants. See sec. 2358, Ann. Code 1892, and Laws 1896, p. 93, ch. 84. On the first assignment of error, therefore, that the court erred in not quashing the jury box, I think the court plainly erred to the great prejudice of the appellant.

The only other assignment of error I care to notice is that the court erred in compelling the appellant to exhaust a peremptory challenge upon Langston, a member of the special venire, instead of sustaining the defendant's challenge to set the juror aside for cause. Very much testimony was delivered upon his examination on his *voir dire,* but the one fact that stands out monumentally is that he heard a juror who had tried this man on a former trial detail the testimony of the witness on that trial. He testified that that gave him an opinion, and that it was a fixed opinion, and finally, after much examination, he testified as follows, after having said that he believed what the juror told him: "Q. And your opinion is fixed to the extent that you believe what this party told you? A. Yes, sir. Q. And it would require pretty strong evidence to remove that opinion? A. Of course, I believed what I heard him say. Q. And it would take strong evidence to remove what you have heard about it? A. Yes, sir; of course." It is true that afterwards, on further examination by the court, he said that he could fairly and impartially try the case according to the law and the testimony; but that sort of answer is completely disposed of by this court in the opinion delivered by PRICE, J., in the case of *Fugate* v. *State,* 82 Miss., 195, 33 South., 943. That judge said, with great power, on this very

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point: "Most men, upon being asked by the trial judge, would answer that they could try a case impartially notwithstanding an opinion. Few would answer, though unconsciously to them the fact might be, that they had a desire to reach a verdict to which the evidence did not conduct, although their minds were so fixed, biased, or prejudiced as to easily reach a verdict to which the evidence did not logically conduct. Such is the constitution of the human mind, such the frailty and imperfection of human nature, that one could hardly be expected to declare himself controlled by bias or prejudice when under oath, and perhaps the more honest the man the more solemnly would he assert his freedom from both." And the juror in that case was held incompetent, although he answered that he had no bias or no prejudice, and could try the case fairly and impartially; the evidence further showing that he had heard certain parties detail what the witnesses had said in the courthouse, and that from that he had formed an opinion which it would take evidence to remove. Here how much stronger is the case, where the juror formed his opinion, which it would take strong testimony to remove, from hearing a juror who had formerly tried the case detail the testimony of the witnesses. And so, also, in the case of *Klyce* v. *State,* 79 Miss., 658, 31 South., 340, my Brother CALHOON said with great clearness and force: "It would nullify the constitutional purpose, and endanger the fairness of the trial, to hold a juror who has an opinion formed merely because he says he could try the case impartially. He may say so, and think so; but it is for the court to say whether he can in fact, viewed in the light of the weakness of human nature. We are constrained to think that a man who has heard the facts from the state's witnesses, and believes what they told him, and from that has formed an express opinion which he still retains, is not an impartial juror in the meaning of the constitution, whatever may be his idea of his power to try impartially." If these two cases are to stand, beyond all question, Langston was an incompetent juror, and the defendant's

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challenge of him for cause should have been sustained. Great reliance is placed on the case of *Gammons* v. *State,* 85 Miss., 103, 37 South., 609, but what is said in that opinion, so far as decision is concerned, is, of course, to be taken in the light of the facts of that particular case. Indeed, the gist of the whole opinion in that case is that each case, as to this matter, must be decided according to its own peculiar facts. Now, what are the facts in the *Gamons case?* There the juror McCormick, who was held competent, stated (page 110 of 85 Miss., page 610 of 37 South.) that he had no bias, feeling, or prejudice against defendant, and would try him fairly and impartially on the evidence introduced, and would return a verdict according to law and evidence, and had no other motive in going on the jury; that he had heard of the case, and had seen it in the paper; that he had heard rumors, but that he had never heard any of the witnesses, and had never heard it talked in town. And so the juror Gillon testified to substantially the same thing, having never heard any one who personally knew anything of the case, and had formed the opinion which he had from what he saw in the newspapers, and he further said that he would go in the jury box "as free as I believe it is possible for a human mind to be." It certainly is too plain for comment that jurors who never heard the witnesses, never heard any person who personally knew anything about the case, and whose slight opinion was induced simply by what they saw in the newspapers, and who otherwise perfectly qualified themselves, could not be challenged for cause; but the case of those two jurors—Gillon and McCormick, in the *Gammons case*—is as far apart from the condition of Juror Langston in this case as the two poles. Langston had an opinion, a fixed opinion, which it would require strong evidence to remove, which opinion he had formed from listening to a juror who had once tried the case relate the testimony of the witnesses delivered on the trial. I cannot think, in any possible view of any well-considered au-

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thority on this subject, that Langston should have been held a competent juror.

No one is further than I from reversing cases on mere irregularities in procedure. I do not believe that an instruction erroneously given or refused, or testimony erroneously admitted or excluded, or any other mere irregularity in procedure in the progress of a trial, should ever cause a reversal, when the court, looking back over the completed record, can confidently affirm that the right result has been reached, and that no different result could reasonably be expected on a new trial. That is one case. But when, as here, the party has been denied, as I think, his fundamental legal right with respect to the jury that is to try him, then there is no question, as my brethren have said, of mere irregularity; but the question is one presenting plainly a flagrant violation of a fundamental right, and wherever this is the case the party is manifestly entitled to a new trial. I dislike exceedingly to dissent from my brethren; but, when the doubt of the correctness of their conclusion reaches the dignity of a conviction with me, it then becomes my duty to dissent, however reluctant I may be to do so. The present decision squarely overrules the *Klyce case* and the *Fugate case, supra,* as to the principle affecting the competency of Juror Langston, and the *Sheppard case* as to the principle affecting the vitiation of the jury and the jury box by the selection, instead of the drawing by lot, of the regular venire—the eighty names. It is a decision which, in my judgment, sanctions in the concrete case what in the abstract it condemns—selection by intentional choice of grand and petit juries.

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Brief for appellant.

EDWARD D. PEIRCE v. ROBERT E. HALSELL.

[43 South., 83.]

1. CHANCERY PLEADINGS AND PRACTICE. *Tender. Partition.*

A defendant in a partition suit, who by his answer claims a greater interest in partnership lands than the complainant, his copartner, concedes to be his, should not be denied his share as claimed because of his failure to pay into the court a balance due on his contribution to the joint purchase when by his answer and testimony he denies knowledge of the amount of such balance and alleges his readiness to pay the same when ascertained and previous offers by him so to do.

2. SUPREME COURT PRACTICE.

The supreme court, having only appellate jurisdiction, will not decide what was expressly pretermitted in the court of original jurisdiction.

FROM the chancery court of Jones county.

HON. JAMES L. MCCASKILL, Chancellor.

Halsell, appellee, was complainant in the court below; Peirce, appellant, was defendant there. From a decree in favor of complainant, defendant appealed to the supreme court.

The suit was for partition of land. The cause was heard on the merits and the court decreed a partition of the property save as to a segregated part which was ordered sold for division of the proceeds. The contention between the parties was in regard to their respective interests in the land. The opinion states the facts.

Mayes & Longstreet, for appellant.

The bill filed by Halsell, the appellee, alleged that Peirce, the appellant, owned only a two-sevenths interst in th property sought to be partitioned. Peirce's answer denied that his interest was limited to such a small proportion, and al-

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leged that he was entitled to a full half interest therein, alleging further that he and Halsell had entered into a partnership for the purpose of purchasing the property from the various tenants in common who originally owned it, the plan being that Halsell was to purchase the property and subsequently he, appellant, was to pay one-half of the purchase price to Halsell. His answer further sets forth that after Halsell had thus acquired the property he refused to acquaint appellant with the various purchase prices paid by him, Halsell, for the various interests, and further refused to consider appellant as having any rights or claims other than the above mentioned two-sevenths undivided interest. Appellant's answer distinctly avers that he did not know what amount he was due to Halsell for his half of the purchase price, but whatever it was he was willing and had always been willing to pay the same, and had moreover offered repeatedly to do so. The evidence offered by appellant supported these averments of appellant's answer.

It will be seen from the decree of the lower court that the court's finding of facts was in favor of appellant. The decree practically states that there was a partnership; but it further alleged that, notwithstanding the partnership, Peirce was not entitled to his one-half interest in the land for the sole reason that he had not paid Halsell the money necessary to make up his half of the original purchase price. It is of this part of the decision that the appellant complains.

On the trial in the court below, the testimony of appellant as to a verbal agreement of partnership between him and appellee was objected to. The objection was on the ground that such an agreement could be proved only by writing. *Evans* v. *Green,* 23 Miss., 294.

Peirce, therefore, having a valid and binding contract, verbal though it was, of partnership with Halsell; and the title deeds, taken by Halsell in pursuance of that partnership agreement, having been taken in order to avoid the appearance of competition and consequent raising of the price asked for the

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land, Halsell became merely a trustee of the legal title of five-sevenths interest in the land for the benefit of the partnership; just as Peirce was in like manner a trustee of two-sevenths interest therein for the benefit of the partnership by reason of the two-sevenths interest purchased in his name. The court should have decreed that the land should be divided equally between the parties, and that Peirce should pay to Halsell, with interest, one-half of whatever amount of money Halsell had paid out in the acquisition of such land, in excess of such amount as Peirce had paid out; and should have provided further that the money was due on account stated from Peirce to Halsell, and the same should have been made a lien on Peirce's divided interest in Halsell's favor.

There was no necessity for payment of money by Peirce into court. Yet the chancellor, while recognizing the truth and justice of Peirce's claim that there was a partnership, declared in effect that Peirce had practically forfeited a certain proportion of his interest in the land, with the profit thereto attaching, simply because he had not paid or tendered to Halsell the full proportion of the purchase money.

Another reason why there was no necessity for Peirce to tender or to pay any money into court is apparent when the appellee's bill of complaint is examined. Both in bill and testimony appellee repudiated utterly the proposition that Peirce had any right whatever in the property save a bare two-sevenths interest, or that Peirce owed him anything on account of purchase price of the land. Appellee denied that any agreement existed between him and appellant, or that anything whatever was due him by appellant save a small proportion of an expense account. Thus denying and thus repudiating any liability on the part of Peirce, how could appellee claim that Peirce had forfeited any right which Peirce might have in the land by not liquidating the liability so denied? It is obvious, considering the temper displayed by Halsell and considering further the scheme sought to be worked by him, that

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Brief for appellee.

it would have been useless for Peirce to tender him any money.

In conclusion we submit that the decree of the lower court was inconsistent. Reaching the conclusion that the chancellor did in holding that the partnership was formed and that the land was purchased by Halsell in pursuance of such partnership, it is impossible to avoid the conclusion that Halsell undertook to go back on that agreement, and that all that Halsell can equitably claim is, that whatever Peirce may owe him on the purchase price shall be made a charge and lien on Peirce's divided interest in the property.

T. H. Oden, and *R. E. Halsell*, for appellee.

If the transaction between appellant and appellee constituted a partnership, it was certainly a very one-sided one, for the proof indisputably shows that the appellee, Halsell, abstracted the title of the property, arranged for the securing of the deeds of about forty different heirs of the original owner covering their interests therein, closed up his office time and again in order to go into the country to make negotiations of purchase, took necessary steps to acquire the interests of three minor heirs, built a house for these minor heirs and the widow who lived upon the property, in order to secure their removal from the property, paid the taxes, did not owe Peirce, the appellant, anything throughout, as appellee paid out his own money for the different heirs' interests, and had all deeds made in his own name and promptly placed of record. No effort was made at any time by Peirce to acquire a half interest in the property. Not until the bill for partition was fixed and answer thereto was made by Peirce, did the appellee, Halsell, have any knowledge that Peirce was claiming a partnership arrangement with him. The allegations in the answer in regard to this alleged partnership in the land, its terms and conditions, are based upon merely alleged verbal, not written, agreements. If a partnership existed, it was not an equal partnership, as alleged by appellant's answer, but a very unequal partnership.

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Brief for appellee.

Neither the answer nor the proof shows that Peirce at any time before or after filing of this suit, made appellee a tender of the money representing his alleged net one-half of the purchase money of the land. He made no tender on the trial, although the deeds to Peirce, showing considerations paid to the different heirs by appellee, were all of record. Neither answer nor proof discloses that Peirce ever in any manner tried to ascertain from Halsell the amounts Halsell had thus paid out. Although Peirce had a two-sevenths interest in the lands by a purchase which he had made from certain heirs, he did not even pay any part of the taxes due on the whole land. Appellant's nearest approach to a tender is the allegation in his answer that he "offered" to pay to Halsell whatever might be the proper proportion of the purchase price of the whole land. But it is not stated, nor in any other manner shown, when, where, or how often, he "offered" to make such payment. The allegation of the answer is moreover distinctly denied by Halsell who in his testimony declared that Peirce had never at any time offered to him a cent. Halsell's testimony further shows that the financial condition of Peirce was such that he, Halsell, would not enter into any partnership relations of any kind with him.

As between partners community of profits is essential to the existence of a partnership. *Jones* v. *Howard,* 53 Miss., 707. The intentions of the parties, *if not inconsistent with the contract's terms,* will control. *Fairley* v. *Nash,* 70 Miss., 193, s.c., 12 South., 149. The evidence shows in this case that Halsell had no intention of forming a partnership with Peirce, and that such a thing was inconsistent with his ideas, inasmuch as he knew Peirce's financial status.

It will be noted that Peirce's claim that three-sevenths interest in the lands in controversy and held by Halsell in his own name is partnership land, rests entirely upon an alleged *verbal* agreement; and he further claims that the purposes for which the alleged partnership was formed have not yet been con-

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summated, hence the lands are not now subject to partition. His answer alleges that by virtue of the purchases of the different interests in the land by Halsell, Halsell holds these interests, under an implied trust, as a trustee for himself and Peirce. Neither the law nor the facts will sustain such claims. In *Randal* v. *Yates,* 48 Miss., 685, this court said, "It is not essential to the existence of a partnership that it be in writing, but it may be proved otherwise. Yet when the testimony in favor of and against complainant seeking by his bill to establish a partnership, is so conflicting as to leave it a matter of doubt, and the lower court has decreed against him on the trial, the appellant court will not disturb the decree. In the case of *Evans* v. *Green,* 23 Miss., 294, cited by counsel for appellant, it is held that parties may verbally agree to buy land. No one denies this. But this very case holds that, "the contract sought to be enforced is denied by the answer, and the proof must be certain, and such as to leave no doubt that the contract was made creating the trust."

In conclusion we submit that as the chancellor considered fully all of the contentions set up by the pleadings, and after careful consideration of the conflicting evidence, decided as he did, the decree should be affirmed.

CALHOON, J., delivered the opinion of the court.

In a proceeding for partition, recognizing Peirce as the owner of a two-sevenths interest, Peirce, in his answer to Halsell's bill for the partition, set up that he was a full partner in the part in which he was not so recognized, averring that the understanding was he was to be such partner, for reasons given, though the title was to be put in Halsell's name. His answer also avers that he does not know the exact amount he owed Halsell for the purchase price, but that he stood ready and willing to pay it, and had offered to do so. In his testimony he repeats this. Halsell in his evidence denies the partnership and the offer. In the final decree the court below finds:

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Statement of the case.

"That, although the allegations of E. D. Peirce as to the existence of a partnership between himself and complainant may be sustained by the weight of evidence, yet it also appears that Peirce failed to pay Halsell such part of the purchase money of said lands as he should have paid as an equal partner, and has failed to make and maintain legal tender of the same. Therefore he is not now entitled to a one-half interest." In a case like this payment of money into court is not necessary, and the decree went off on what we think an erroneous idea.

All that is left is whether there was a partnership, and this is not decided. As we are only a revisory court, we do not decide what was expressly pretermitted in the decision of the chancery court, and therefore, while we must reverse, we remand for full adjudication.

Reversed and remanded.

GUM CARBO CO. v. NEW ORLEANS GERMAN GAZETTE.

[43 South., 82.]

EQUITY PRACTICE. *Negligence. Judgment. Injunction.*

Equity will not aid the negligent by enjoining the collection of an erroneous judgment at the instance of a defendant therein who failed to avail of a full, adequate, and complete legal remedy for its correction.

FROM the chancery court of Harrison county.

HON. THADDEUS A. WOOD, Chancellor.

The Gum Carbo Company, a corporation, the appellant, was the complainant in the court below, and the New Orleans German Gazette, a corporation, the appellee, and the sheriff of Harrison county were defendants there. From a decree sustaining a demurrer of the defendant corporation to complainant's bill and dismissing the bill complainant appealed to the supreme court.

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Brief for appellant.

The appellant, the Gum Carbo Company, sued out an injunction against the appellee, the New Orleans German Gazette, and against the sheriff of Harrison county, appellant's bill reciting that the appellee had a short while prior to the filing of the bill brought suit against appellant in the court of a justice of the peace of the county for $61, and obtained judgment for only $11.50, from which appellee, being dissatisfied with the small amount, had appealed to the circuit court; but afterwards when the case was called for trial in the circuit court discovering that through mistake of the justice of the peace judgment had been entered upon his justice's docket for the full amount of $61, the appellee had dismissed its appeal and subsequently had had execution issued to the sheriff of the county to satisfy the judgment as entered. Appellant's bill admitted indebtedness to the appellee in the sum of $11.50, which it offered forthwith to pay with all costs accrued, and prayed for injunction to restrain the sheriff from proceeding to make sale of certain lands of appellant to satisfy the aforesaid judgment for $61. The bill failed to show that any steps had at any time been taken by appellant at law to relieve himself from the erroneous judgment of the justice of the peace by appeal or otherwise. The appellee demurred to the bill, and filed a motion to dissolve the injunction which had been granted and for damages for the wrongful suing out of the injunction. The court sustained the demurrer and the motion, dismissed the appellant's bill, and allowed damages on appellant's injunction bond in the sum of $20, solicitors' fees.

Brown & Owen, for appellant.

There are two questions to be considered in this cause. The first is, whether any adequate remedy existed for appellant with reference to the incorrect judgment of the justice of the peace. We submit that, so far as we can ascertain, this question has never been passed upon by this court under circumstances similar to this, other and prior seemingly similar cases being

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based upon judgments admittedly void *in toto*. It will be noted that the appellee as plaintiff was entitled to and was given a judgment before the justice of the peace for $11.50, the judgment being however erroneously written on the justice's docket for the full sum demanded, $61, and from such judgment the plaintiff appealed, not being satisfied with the judgment for $11.50. Now, the judgment for $11.50 was valid and binding upon appellant, since appellant did not take a cross appeal. But appellant was not legally due the balance of $49.50. Certainly appellant was without relief at law.

The second question presented is, to what cases will equity lend its aid to enjoin a judgment at law? It has been held that a judgment of a justice of the peace cannot be set aside by another judgment subsequently rendered by the justice of the peace. *Morris* v. *Shryrock,* 50 Miss., 590. Hence, as there is a remedy for every wrong, it is apparent that appellant was entitled in this cause to equitable relief. "A court of equity may interpose to grant relief where on account of some mistake of fact made by the judge or party to an action an inequitable judgment has been rendered." 12 Am. & Eng. Ency. Law (1st ed.), 144. See also *Brewer* v. *Jones,* 44 Ga., 71; *Ford* v. *Ford,* Walker (Mich.), 505; *Bothel* v. *Oodrick,* 34 Ia., 518; *Wilson* v. *Broughton,* 50 Mo., 17.

In the case of *Jeffrey* v. *Miltings,* 46 Conn., 602, it is held that "an injunction against the enforcement of a judgment at law may be allowed if a good defense is established against the entire claim upon which it is established, if the defense goes only to part of the claim." See also *Bowen* v. *Clark,* 46 Ind., 405, to the same effect.

As regards the right to equitable relief we further call the court's attention to the language of our state constitution, sec. 160, in reference to the court of chancery: "And in all cases where said court has heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to

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grant the relief sought, although the legal remedy may not have been exhausted.

We submit that the injunction should have been continued in force, and appellee's motion dissolved.

John L. Heiss, for appellee.

Whatever were the real facts as to the mistake of the justice of the peace in entering the judgment complained of, it must here be admitted that all facts well pleaded in the bill of complaint must be considered as true. And under such facts the appellant cannot be entitled to relief.

This is not a cause where the records of the court show that the judgment for $61 was void, or that any fraud was committed. The appellant had a plain, adequate, complete and appropriate remedy at law, of which it failed to take advantage. *Harper* v. *Barnett,* 16 South. Rep., 533; Black on Judgments, 307.

Under the decisions of this court the appellant under the circumstances will not be permitted to enter a court of equity to invoke a drastic remedy of injunction to correct the judgment or to correct it. *Ricks* v. *Richardson,* 70 Miss., 424, s.c., 11 South., 935; *Sturges* v. *Jackson,* 40 South. Rep., 547.

Even were the judgment for $61 void because of lack of proper service of process or because of fraud the chancery court would not perpetually enjoin the judgment, but would take full and final jurisdiction and dispose of the case on its merits so as to do full justice to all parties. *Newman* v. *Taylor,* 69 Miss., 670, s.c., 13 South., 831.

The appellant was guilty of negligence in not prosecuting an appeal from the judgment of the justice of the peace, hence cannot be heard in equity. *McRaney* v. *Coulter,* 39 Miss., 392; *Hiller* v. *Cotton,* 48 Miss., 593; *Fleming* v. *Nunn,* 61 Miss., 603.

MAYES, J., delivered the opinion of the court.

We can find no error in the chancellor's ruling sustain-

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ing the demurrer, dissolving the injunction, and dismissing the bill filed in this case. There is nothing in the record which presents any ground for equitable relief. By the exercise of the most ordinary diligence appellant could have relieved itself from the error alleged to have been committed by the justice of the peace in entering the judgment. Its own negligence forms the only basis for its resort to the chancery court for relief, and, this being the case, it has no standing in a court of equity. Had it exercised proper diligence, the courts of law afforded it ample remedy. *McRaney* v. *Coulter,* 39 Miss., 392; *Bruner* v. *Planters' Bank,* 23 Miss., 406; *Hamilton* v. *Moore,* 32 Miss., 625; *Hiller & Co.* v. *Cotton,* 48 Miss., 593; *Fleming* v. *Nunn & Anderson,* 61 Miss., 603.

Affirmed.

JUSTINE COURTENAY v. MAY A. COURTENAY ET AL.

[43 South. Rep., 68.]

WILLS. *Interest given. Trusts. Precatory words.*

A will devising to the wife of the testator all of his property, the proceeds to be appropriated to the payment of his debts and the support of herself and his children, invests a perfect title in the wife after the youngest child reaches majority, the precatory words not creating a trust, although the devise was followed by a request that the real estate should not be sold or mortgaged during the minority of any one of the children, coupled with a recital that after such time she should be at liberty to make whatever disposition of the property she might deem proper for the use and benefit of the children.

FROM the chancery court of Harrison county.

HON. THADDEUS A. WOOD, Chancellor.

Justine Courtenay, appellant and cross-appellee, was complainant and cross-defendant in the court below; May Courtenay and others, appellees and cross-appellants, were defendants and cross-complainants there. From a decree in favor of the cross-complainants, granting only in part the relief sought by

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Statement of the case.

the cross-bills, complainant appealed, and cross-complainants prosecuted a cross-appeal, to the supreme court.

In 1886, one C. Courtenay, a resident citizen of Harrison county, died leaving considerable estate consisting chiefly of a mercantile business and certain lands, in Harrison county. His widow, Justine Courtenay, and seven infant children survived him. He left a last will and testament, which was as follows:

"This is my last Will and Testament. In which I will and bequeath to my wife, Justine Courtenay, all my worldly goods both real and personal. The proceeds of which to be appropriated for her support and that of my children and the payment of my debts if any. It is my desire that all claims against my estate shall be amicably settled without recourse to law.

"And it is my further request that no sale or mortgage be made of any of my real estate during the minority of any of my children. After which time my wife will be at liberty to make such disposition of the property here bequeathed as she may deem proper for the use and benefit of my children.

"And I request that my son Victor Courtenay will continue the management of my business under the direction of his mother without salary during his minority.

"In testimony whereof I have hereunto set my hand at Pass Christian, State of Mississippi, Harrison County, on this the 30th December, A. D., 1885.

"C. COURTENAY."

"Witness:

F. B. HIERN.

N. H. HEWES."

In 1905, Justine Courtenay, the widow, filed a bill in the chancery court wherein she alleged that the will had been duly probated and letters of administration, with the will annexed, issued to her in 1886; that the estate had been duly admin-

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istered, all debts due by the estate paid, all monies owing to the estate collected, and that all of the children of the testator had become of age, and the bill prayed for complainant's discharge as administratrix, for a construction of the will and for a decree quieting and confirming in her, under the terms of the will, the title to all of the real and personal estate of the said decedent. The six surviving children of the testator and petitioner, and May A. Courtenay, the widow of a deceased son of testator, together with her three infant children, were made defendants. May A. Courtenay for herself and her children, as representatives of testator's deceased son, filed an answer, making the same a cross-bill, admitting the allegations of fact in complainant's bill, but contending that under the will the testator's widow, Justine Courtenay, did not take a fee simple title to the land and personalty of the testator, but that the will created a testamentary trust which was to terminate when the youngest of the testator's children became of age, and that the land was then to be sold, and the proceeds, together with what remained of the personalty, should be divided among the heirs of the testator. The cross-bill charged that the estate had been negligently managed, and that Justine Courtenay, the complainant, had failed to account for the money and property which she had received of the estate while in charge of the same as administratrix and testamentary trustee; and prayed that the will be construed to constitute a testamentary trust, and for an accounting upon the part of Justine Courtenay and a division of the property. Azoline Saucier, a married daughter of the testator and complainant, filed similar answer and cross-bill. The other children of the testator and complainant merely filed an answer to the bill, and also answered the cross-bill of May A. Courtenay and Azoline Saucier, admitting the allegations and conclusions of law of the complainant, Justine Courtenay, and declining to set up any claim to the property. The answer of the complainant, Justine Courtenay, to the cross-bills of May A. Courtenay and Azoline Saucier denied the

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legal conclusions set up therein, and denied any mismanagement of the estate, and further denied that the cross-complainants had any interest whatever in the estate.

On the hearing the court below decreed that the will created a testamentary trust, that under its provisions it was the duty of Justine Courtenay, the complainant, to have divided all of the personal property coming into her hands when the youngest child became of age, and that the widow and children of the testator were each the owner, after the majority of the youngest child of the testator, of an undivided eighth interest in the land, and that an accounting should be had before a commissioner, appointed for that purpose, to ascertain the value of the estate. From this decree the complainant, Justine Courtenay, appealed, to settle the principles of the cause; and because the decree failed to order a sale of the lands and a distribution of the proceeds among the children and grandchildren of the testator, the cross-complainants, May A. Courtenay, and her three children, and Azoline Saucier, prosecuted a cross-appeal.

W. G. Evans, and *T. M. Evans,* for appellant and cross-appellee.

The first paragraph of the will shows that the testator devised, in fee simple, all of his property to his wife to be appropriated for the support of herself and his children. The will further contains the request that no sale or mortgage of any of the real estate be made during the minority of the testator's children. But after the children had arrived at maturity, the widow, Justine Courtenay, was to have the right to make such disposition of the property of the estate as should seem to her proper for the use and benefit of the children.

The first paragraph of the will places the legal title of the testator's property, real and personal, in his widow. After such disposition by the testator of his property the subsequent clauses of his will are mere requests. Accordingly at the death

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of Courtenay, his widow became vested with a fee simple title to the lands of his estate. As regards the clauses as to not mortgaging the same, the testator merely inserted these wishes in the will not to be binding absolutely upon her, but as advice to her and to prevent the lands from being wasted before the youngest son should be of age.

This is evident, for in the same paragraph of the will the testator states that after the youngest child should become adult, the widow might make such disposition of the property as should seem to her proper. Testator's purpose was to throw around the management of the property willed to his widow, such safeguards as would best preserve it and prevent it from going into the hands of strangers. The testator evidently considered that after his widow had reared and educated the children, she should have all of his property and that as the mother of the children she would let the property at her death go by descent to the children.

The disposition of the property was left by the will to the sound discretion of the widow with the right to dispose of it as she should deem proper.

The words, "for the use and benefit of my children" do not create a trust of any kind, for they must be taken in connection with the words, "she may dispose of the property as she may deem proper." Can it be held, after the legal title to the property has been placed in her and the will authorizes her to dispose of it as she may deem proper, that she has not the power to give one of the children a greater share therein than another?

The gist of the matter is that under the will Mrs. Courtenay was to have the full legal title, to all property, both real and personal, and when the youngest child should become adult she should have the right then to dispose of the property in any way deemed advisable.

The testator's request has now been followed; all seven of the children have been maintained and educated, the youngest has

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passed the age of maturity. The desire of the testator as to the maintenance and education of his children has been carried out by his widow; and for these children, or any of them, to contend that the will carries a trust, expressed or implied, and that it is the duty of the widow to sell and divide the personal and real property, whether she may deem it proper or not to do so, cannot be upheld by any true construction of the will.

That the will conveyed the title of the property, real and personal, to the widow, Justine Courtenay, is of course beyond dispute, and that she had the right to dispose of the property is also beyond dispute. As a sequence she was given a fee simple title. Rood on Wills, secs. 530, 531, 536, 537; *Bradley* v. *Carnes,* 94 Tenn., 27, 45 Am. St. Rep., 696; *Stowell* v. *Hastings,* 59 Am. Rep., 748; *Roberts* v. *Lewis* (U.S.), 38 L. Ed., 750; *Mansfield* v. *Shelton,* 67 Conn., 390, 52 St. Rep., 285.

It is clear that Justine Courtenay took the property, charged first with the payment of the debts of the deceased; second, with the support and education of the children during their minority. There is a vital distinction between a charge against an estate and an estate in trust. A legatee receiving a legacy with a charge assumes the charge, and Justine Courtenay, the widow, was in this case charged with the payment of the debts of the testator and with the education and maintenance of the children during minority. But if the estate was a trust then she was charged only with the execution or fulfilment of the trust. And if a trust, she was obliged to account for every dollar expended or received. The cross-complainants, appellees and cross-appellants, are claiming under the will and not as heirs at law. They do not claim that the will is void, or that the title passed to them as heirs; nor do they claim that the widow, Justine Courtenay, has failed to pay the debts of the estate or failed to maintain and support any of the children of the testator during minority. As they claim solely under the

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will it is obligatory for the appellees and cross-appellants to show that there was a specific interest ascertainable under the will as to which they have legal right to institute proceedings.

We see no reason for discussing any of the issues contended for by the cross-appellants, for if the widow, Justine Courtenay, owns the property of the estate absolutely, as we have above contended, it is evident that the appellees and cross-appellants have no standing in court.

Ford & White, for appellees and cross-appellants.

In the construction of wills the courts look to the whole instrument. *Leigh* v. *Harrison,* 69 Miss., 923, 11 South., 604; *Watson* v. *Blackwood,* 50 Miss., 15. The plain provisions of a will must be executed as written. *Elliott* v. *Topp,* 63 Miss., 138. In the construction of wills the principle of lineal representation is accepted as an implied basis of distribution, except so far as a purpose to set it aside is clearly expressed. *Edgeley* v. *Baker,* 29 L. R .A., 328. Where the meaning of a devise is uncertain, the law will adhere as closely as possible to the general rules of inheritance, and whosoever claims against the law of descent must show a satisfactory written title. *Miles* v. *Elliott,* 26 Pa. Sup., 443; Am. Dig., 1905, p. 4419.

Under the above rules there should be little difficulty in arriving at the real intent and purpose of the testator. It will be seen by the record that at the time of the execution of the will the testator owned a considerable estate consisting of realty and also a mercantile business. He had a wife and seven infant children at the time. He evidently believed that by holding the real estate, freed from mortgages, it would produce a sufficient income to support the family during the minority of the children. The will shows that he intended to create a trust to continue during the minority of the children, inasmuch as the will directs the profits of the property to be used for the support of the wife and children. In conferring the power upon his wife to dispose of the property, after all the children

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should arrive at age, nothing would have been easier, had he intended to give all the property to his wife, than for the will to have recited that she should retain the proceeds absolutely, or during life, or for any other term that he might have contemplated. He, however, only authorized a sale after the children should have become of age, and then only as should seem to his wife to be best for the use and benefit of the children. To construe the will literally as written would result in a holding by the court that the widow after the arrival of the youngest child at twenty-one years of age had no interest in the property at all. We have insisted upon no such unnatural constructon however, for it is manifest that the testator intended his wife to be one of the beneficaries of his estate together with his children.

We insist that the purpose of the testator, as shown in the will, was to create a testamentary trust of this property whereby during the minority of his children his wife should have control of it and should make such use as in her judgment might seem best for their maintenance, education and support; it was the testator's further intention that after the maturity of the youngest child a division should be made among the beneficiaries under the will, that is, his wife and children. And in order that there might be no sacrifice of the property a discretion was vested in the widow as to the method and time of selling the property. This, however, of course had no effect to destroy the whole purpose for which the title was vested in the wife, namely, that the property might be disposed of "for the use and benefit of the children." There was evidently no intent on the part of the testator to vest in each child an equal share of the estate at the time of the testator's death, but he wisely left to his wife the matter of expenditure to be made in behalf of each child when the youngest child should have become of age. This is clearly a case of what is commonly denominated an equitable conversion, that is, that the testator had not intended to devise the lands to his children but merely contem-

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plated a sale of the lands when the youngest should be of age, and a division of the proceeds of sale among the children.

In the creation of a trust no particular form of words is necessary. Equity will ascertain the intention of the party and if there be an intent to make a trust the same will be upheld by the court if equitable. *Colton* v. *Colton,* 127 U. S., p. 300 (L. Ed. Book 32, p. 143); Underhill on Wills, 2 vol., p. 1111; *Hunter* v. *Hunter,* 79 Am. State Rep., 845; *Lucas* v. *Lockhard,* 10 S. & M., 467; *Beyer* v. *LeFevrem,* 186 U. S., p. 122 (L. Ed. Book 46, p. 1083); *Adams* v. *Cowan,* 177 U. S., 477 (L. Ed. Book 44, p. 53).

The whole case of the appellant and cross-appellee is based upon the decision of *Wallace* v. *Dold,* 3 Leigh, 258, and a number of Virginia cases following it, ending with the case of *Tyak* v. *Berkley,* 93 Am. St. Rep., p. 963. Aside from the fact that these Virginia cases all rest upon a state of facts so essentially different from the facts in this case as to have absolutely no application, the most, if not all or quite all of them arose during a time the property was held in trust by the devisee and before the time for a sale had been reached a similar situation which would have arisen in this case had one of these heirs applied for a division of this property before the youngest child became of age—and the court held that the trustee held for the benefit of all, and that no particular interest was vested in any one, a proposition which is not presented in this case at all. But in the later case of *Fitzpatrick* v. *Fitzpatrick,* reported in the 93 Am. State Rep., 976, the Virginia court practically abandons the rule announced in the older cases and holds that the construction that a wife would take an entire estate where it was devised to her for the benefit of herself and children, would only be maintained where the language of the entire instrument showed that to be the intention of the testator. This is exactly the construction that we are contending for, that is that this will is not to be interpreted by any isolated expression in it, but the court looks to the entire

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will and determines from an inspection of the entire instrument what the intention of testator was, and we respectfully insist that taking this will altogether that it established a plain and unequivocal testamentary trust, terminating when the youngest of the children should arrive at the age of twenty-one years.

We concede that Courtenay never intended to devise the land to his children, but simply the proceeds of the land. It was unquestionably his purpose to vest the title in his widow in trust for herself and the children during their infancy, leaving to her the question as to the proper amount to be expended during that period in the education and maintenance of each. But when the youngest child became of age, the holding together of the property being no longer necessary for the support of the family, he directed a sale, for *"care"* and *"benefit"* of the children, showing that they were the real objects of his bounty. He left to her a discretion as to the best method of converting the land into money, but the children were at least to enjoy the results of a sale along with the widow. This creates a clear case of equitable conversion. This doctrine is a principle of equity which regards that as done which ought to have been done, and will treat money as land, or land as money as the case may be. *Hardee* v. *Cheatham,* 52 Miss., 46; 2 Underhill on Wills, 955. A discretion as to the time when the sale is to be made does not alter the rule. 2 Underhill on Wills, 959. Where it is impossible to carry out the provisions of a will without a sale of the property a case of equitable conversion arises. *Fahnesstock* v. *Fahnesstock,* 34 Am. St. Rep., 628; see also 5 Am. State Rep., 141, 148. It is impossible that these children can ever acquire any "benefit" or be cared for while this land is held by the executrix under an assertion of a claim in fee.

As to the time when this conversion occurred, by the terms of the will it arose when the youngest child became of age. *In re Walkerly,* 49 Am. St. Rep., p. 97.

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Brief for appellees.

Jno. J. Curtis, on the same side.

The principle point to be determined in this case is, whether under the will a trust was created, and whether an equitable conversion of the real estate was intended by the testator, the same to take effect at a specified time in behalf of the widow and children. If there was a trust it is also of vital concern to determine whether the widow can conscientiously and impartially continue to execute the trust, inasmuch as she has assumed an antagonistic position in reference to the trust, after an administration of the estate covering several years.

To determine these two points one must look to the will. The reading of the will definitely shows that the testator intended to provide for the support and maintenance of his children during their minority and until the youngest child should arrive at the age of twenty-one years; and that the widow should also be provided for. To accomplish such ends he provided that his mercantile business should be continued by his widow after his death and that his real estate should be kept free from incumbrances, so that the profits from the mercantile business and the rents and revenues from his lands, should be applied towards the support of his widow and children. In other words, the testator devised all his property to his wife in trust for the use and benefit of herself and her children during their minority and until the youngest child should become twenty-one years of age, during which term the widow was to receive an income from the mercantile business and lands for the use not only of herself but of her children also.

If the testator intended to devise all of his property to his wife alone, he could and would have concluded his will after the words "I will and bequeath to my wife all my worldly goods both real and personal." This would have been sufficient to vest in her a title in fee simple, and all the provision made in behalf of the children would and could have been entirely omitted; or if he intended to accomplish this and trusting to his wife's natural affection to provide for the children, it would

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not have been necessary nor would he have made any positive provision for their support during their minority in the language used, namely, "the proceeds of which is to be appropriated for her support and that of my children"; or that the real estate should not be mortgaged or sold until the youngest child was twenty-one years of age, which clause reads as follows, "and it is my further request that no sale or mortgage be made of any of my real estate during the minority of any of my children."

The concluding clause as to the real estate, namely, "after which time my wife will be at liberty to make such disposition of the property here bequeathed as she may deem proper for the use and benefit of my children," clearly negatives any claim that the fee was devised to the wife. The most the appellant and cross-appellee could possibly claim under the will would be a life estate, subject to termination by a sale of the real estate. The clause last quoted, however, and the preceding clause of the will, show clearly and unmistakably that the testator did not intend to vest in his widow an estate even for life; for certainly he did not contemplate that his widow should retain the real estate and receive and apply the revenue therefrom to the support of her children during her lifetime after these children had passed the age of majority.

It is manifest that the testator intended that his business should be continued by his wife; and that he cherished the hope that it would be successfully conducted and that the profits of the mercantile business and the rents from the real estate should be applied to the support of the widow and children during their minority and until the youngest child should be twenty-one years of age.

The finding of the lower court was correct, and the decree should be affirmed save only as to the failure of the court to decree that the real estate should be sold and its value thereby ascertained, and the equitable conversion concluded. And because of the antagonistic position assumed by the testamentary

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trustee, after several years of administration of the trust, thereby incapacitating herself from further executing the trust, a commissioner should be appointed to act in her stead by the court. On account of the failure of the court below to decree to this end, the cross-appeal in this case was prosecuted.

MAYES, J., delivered the opinion of the court.

So well settled are the principles governing the construction of wills that we deem it unnecessary to enter upon any discussion of this subject. The question is, what was the intention of the testator in the will offered for construction? There was, undoubtedly, a trust created by the will of the testator in the property devised to Justine Courtenay; but it was limited as to the time in which it should exist, and definite in the purposes it was intended to accomplish. The trust expired after the children had reached their majority, and the purpose of the trust was to apply the proceeds of the property to the support of Mrs. Courtenay and her children and additionally the payment of debts. It is also certain that the testator intended that there should be no sale or mortgage of any of the real estate during the minority of the children. After this had been accomplished the property then became absolutely the property of Justine Courtenay. The will provides that all the property, both real and personal, shall be bequeathed to the wife of the testator, Justine Courtenay. It then provides that the proceeds shall be appropriated to the support of her and her children and the payment of the testator's debts. It then provides that there shall be no sale or mortgage of any of the real estate during the minority of the testator's children, concluding in the following language: "After which time, my wife shall be at liberty to make such disposition of the property here bequeathed as she may deem proper for the use and benefit of my children." It will thus be seen that, after the children should have attained their majority and the trust imposed should have been accomplished, no further re-

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striction was placed upon the power of the wife to dispose of the property as she might deem proper for the use and benefit of the children. By this language no obligation was imposed upon Mrs. Courtenay to sell or dispose of any of the property for the benefit of the children; but she might have done so if she deemed it proper. It is not every precatory expression contained in a will which creates a trust; but it is only such expression in the will as clearly shows the testator intended should govern the conduct of the party to whom it is addressed. It is manifest, upon reading this will, that it was not the intention of the testator that this expression should control and govern the conduct of Mrs. Courtenay with reference to what she should do with the property after the children had attained their majority; but it was simply meant to give her the power, in her discretion, if she deemed proper, to help her children. It lifted the restriction which theretofore had been imposed upon her, prohibiting a sale or mortgage of the property, and gave her the power, if she saw fit, to sell or dispose of the property for the benefit of the children. But an absolute title became vested in her after the children became of age.

A lengthy discussion on this subject will be found in *Harrison* v. *Harrison's Admr.* (Va.), 44 Am. Dec., 372, note. In *Foose* v. *Whitmore* (N. Y.), 37 Am. Rep., 573, citing the case of *Bernard* v. *Minshull,* Johns., Ch. 276, and in *Howarth* v. *Duell,* 6 Jur. (N. S.), 1360, it was held: "A devise by a testator of all the residue of his property, real and personal, to his wife, with power to dispose of the same among all his children in her discretion," was held to be an absolute gift to the wife. In the case of *Hutchinson* v. *Tenant,* L. R. 8 Ch. Div. 540, where a testator gave all his property to his wife "absolutely, with full power for her to dispose of the same for the benefit of my family, having full confidence she will do so," it was held that the widow took absolutely. In *Post* v. *Moore* (N. Y.), 73 N. E. 482, 106 Am. St. Rep., 508, in note, will be found a lengthy discussion drawing the distinction between prec-

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atory and discretionary trusts, citing many cases. In *Boyle* v. *Boyle* (Pa.), 25 Atl., 494, 34 Am. St. Rep., 629, where a will provided as follows: "I give and bequeath to my wife all my property, real and personal, for her support during her natural lifetime. Any remainder at her decease to be disposed of by her as she may think just and right among my children"—it was held under this will that the wife took a fee in the property, with the power to sell and devise same. The court stated in this case that the intention of a testator to create a trust must be apparent upon the face of the will. In this case there are many cases cited illustrative of the case under consideration. In *Collister* v. *Fassitt* (N. Y.), 57 N. E., 490, 79 Am. St. Rep., 586, in the opinion of the court, on p. 590 of 79 Am. St. Rep., will be found a citation of many cases sustaining our view of the construction given to this will. Thus, in the case of *Clarke* v. *Leupp,* 88 N. Y., 228, the testator gave all his property to his wife, closing with the words: "And do appoint my wife my true and lawful attorney and sole administratrix of this my will, to take charge of my property after my death, and to retain or dispose of the same for the benefit of herself and children." It was held that the widow took an absolute title and that the succeeding words did not limit the gift. To the same effect is the case of *Lawrence* v. *Cooke,* 104 N. Y., 632, 11 N. E. 144.

There is nothing in this will which indicates any purpose on the part of the testator that his wife and children should inherit the property in equal proportions after all of his children should attain their majority, and we think the decree of the chancellor in so holding was entirely without warrant in the will. There was no trust imposed upon Mrs. Courtenay with regard to this property which was left her after the youngest child became of age, and the property then became absolutely vested in her, and she has the right to dispose of it in any way she may deem proper, without restraint or interference from any one. The record showing that the youngest child is

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twenty-one years of age, she had a right to wind up her trust and take charge of the property now remaining as her own.

We think that the decree of the chancellor should be reversed on direct appeal affirmed on cross-appeal, and the cross-bills dismissed, and a decree entered here declaring this property to be the property of Justine Courtenay.

JOHN RIVERS *v.* YAZOO & MISSISSIPPI RAILROAD COMPANY.

[43 South., 471.]

1. CORPORATIONS. *Slander. Liability. Agents.*

A corporation is liable for slander uttered by its agent acting within the scope of his employment and in the performance of his duties touching the matter in question.

2. SAME. *Knowledge. Approval. Ratification.*

In such case it is unnecessary for a plaintiff to show that the slanderous words were spoken with defendant's knowledge or with its approval or that it ratified the act of the agent.

FROM the circuit court of Yazoo county.

HON. DAVID M. MILLER, Judge.

Rivers, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there. From a judgment in favor of defendant, the plaintiff appealed to the supreme court.

Plaintiff's suit, as originally filed, was for slander, his declaration being in two counts, each of which set out certain alleged slanderous words uttered, June 7, 1905, concerning him by an employe of the railroad company. The declaration was filed June 1, 1906, the suit being instituted within a few days of the expiration of one year following the speaking of the words. Code 1892, § 2742, reads as follows: "All actions for slanderous words concerning the persons or title, and for

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libels, shall be commenced within one year next after the cause of such action accrued, and not afterwards."

Subsequently, October 31, 1906, before pleas filed by the defendant, plaintiff filed an amended declaration, containing four counts; the first one set out a letter written jointly to the chief engineer, the roadmaster and chief time checker, of defendant, by one of its employes, whose duty it was to investigate the records and inspect the work of plaintiff, the plaintiff being a section foreman of the company; the contents of which letter, plaintiff alleged, were false and libelous and injurious to his reputation. The letter was alleged to have been written June 7, 1905 (more than a year before the filing of the amended declaration, but less than a year before the filing of the original declaration based solely on slander). The last three counts set out certain alleged slanderous words uttered by an employe of defendant concerning plaintiff, in the absence of plaintiff, and in the presence of others, two of these three counts being reiterations of the two counts in the original declaration.

To the first count of the amended declaration, being for libel based on the letter mentioned, the railroad company filed special pleas, the third plea, referred to in the opinion, being "that the cause of action did not accrue within one year from the filing of the said amended declaration, and the same is barred by the statute of limitation." The plaintiff demurred to this special plea, but the circuit court overruled the demurrer.

To the second, third and fourth counts of the amended declaration the defendant company demurred on the following ground: "That the said counts are for alleged slander by an employe of defendant, and it nowhere appears in said counts that said alleged slanderous words were uttered and published with knowledge of the defendant, or with its approval or consent, or that the same were ever ratified by the defendant." The circuit court sustained the demurrer. And, as the plaintiff declined to plead further, judgment final was rendered in favor of the railroad company.

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Brief for appellant.

Henry, Barbour & Henry, for appellant.

The amended declaration contains four counts, to the first of which the appellee railroad company interposed the statute of limitation, Code 1892, § 2742, as a plea, and to this the appellant demurred, and the demurrer was by the lower court sustained. We do not care to argue this feature of the case here.

To the second, third and fourth counts in the amended declaration the appellee demurred on the ground that the counts are for alleged slander by an employe of the railroad company, and the counts do not show that the alleged slander was uttered and published with knowledge or approval of the railroad company, or that the same was ever ratified by the appellee.

The count in the amended declaration upon which we most particularly rely, is that which alleges that B. Gilleas, roadmaster of the railroad company for the Louisiana division, and having authority over appellant, maliciously and falsely stated in the office of the appellee in Jackson, Mississippi, in the presence and hearing of others, and in the absence of appellant, that "the old —— of a —— is stealing, and I want him discharged"; whereby appellant's reputation was brought into ill repute.

The authorities cited by appellee in support of the demurrer are, principally, Townsend on Slander, § 265; 18 Am. & Eng. Ency. Law (2d ed.), 1057; and 10 Cyc. 1216. Replying to these authorities we say that the Encyclopedia cited refers to the following cases to support the text, to-wit, *Childs* v. *State Bank,* 17 Mo., 213. Our court in *Williams* v. *Planter's Insurance Co.,* 57 Miss., refused to follow the *Childs case.* Moreover, the Missouri court said, subsequently, that "since the *Childs case* there have been complete changes in the law." *Iron Mountain Bank* v. *Merchants Bank,* 4 Mo. App., 505. Another case cited to support the text of the Encyclopedia is *Hussey* v. *Norfolk, etc., R. R. Co.,* 98 N. C., 34, 2 Am. St. Rep., 312. But this case, instead of supportng the text, holds to the

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contrary, as will be seen on casual examination of the same, and, moreover, cites *Williams* v. *Planters' Insurance Co., supra.* Townsend on Slander, sec. 265, relied on by opposing counsel, cites only two authorities for the writer's views. These two cases are *Maloney* v. *Bartley,* 3 Camp., 210 (an English case), and *Hacker* v. *DeCrott,* 15 How. Prac., 104. Neither of these cases in any way sustains the text, as will be apparent from a careful reading of the opinion in each case.

The only pertinent case cited by counsel for appellee, so far as we have been able to ascertain after thorough examination of the case, is *Behre* v. *National Cash Register Company,* 100 Ga., 214, 27 S. E. Rep., 986; and that case relies upon Townsend on Slander, sec. 265, cited by appellee, without any other authority and without discussion of the proposition or satisfactory reasons for the opinion of the court.

We insist that the question is practically settled in this state by the case of *Brooks* v. *Railroad Company,* 69 Miss., 168, 13 South., 847, and *Williams* v. *Planters' Insurance Company,* 57 Miss., 579, and by *Richberger* v. *Express Company,* 73 Miss., 161, 18 South., 922.

As regards our contention that the second, third and fourth counts of the amended declaration constitute good causes of action, we refer to the following authorities:

Sawyer v. *Norfolk S. R. Company* (N. C.), 54 S. E. Rep., 793, where the court said: "There is some authority for the proposition that a corporation cannot be held civilly liable for slander. And it has been also held that they are only so responsible when they expressly uttered the very words which form the basis of the charge. But it is now well established that private corporations under certain circumstances will be held liable for torts, both negligent and malicious, upon the part of their employes and servants."

Hussey v. *Railroad Company,* 2 Am. St. Rep., 312. This was a case in which the complaint charged that the defendant company had maliciously slandered the plaintiff. There was a

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demurrer which admitted that the agent of the railroad company had uttered the words, and the appellate court held, on the demurrer, that the defendant was liable.

Peterson v. *W. U. Telegraph Company,* 74 Am. St. Rep., 502. This case holds that a corporation will be held liable for the malicious libeling of a person. And to the same effect is *Hoboken, etc., R. R. Co.* v. *Kahn,* 59 Am. St. Rep., 286, and notes.

Fogg v. *Boston, etc., R. R. Co.,* 12 Am. St. Rep., 586. This was a case where the defendant's ticket agent posted a notice in the defendant's ticket office defamatory of the plaintiff. Held, that the defendant company was liable even though the defendant's agent was acting in excess of his authority.

Honey Mfg. Co. v. *Perkins,* 43 N. W., 1075. This case holds that a partnership is liable for a slander uttered by one of the members when about the firm's business. And it is held, in *Glass Co.* v. *Pault,* 13 South. Rep., 800, that the liability of a partnership will be the same as that of a corporation, as regards torts.

Palmeri v. *Manhattan R. R. Co.,* 16 L. R. A., 136. This was a case where the plaintiff was publicly slandered by the defendant's ticket agent in its office, and detained in the office. The defendant was held liable both for slander and for false imprisonment.

Bacon v. *Michigan Central Railroad Co.,* 21 N. W. 324, 54 Am. St. Rep., 372, is directly in point. The plaintiff was discharged by the defendant from employment in its service, and notice was sent by the roadmaster of the defendant to the other officers of the company, assigning as reason of the discharge, the single word, "stealing." This was held to be sufficient publication.

The amended declaration states that the slanderous words were spoken by the agent of the railroad company while acting in the scope of his employment and in the performance of his principal's duties. The lower court should have held that

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Brief for appellee.

on the pleadings the railroad company was liable for damages. *Jordan* v. *A. G. S. R. R. Company,* 74 Ala., 85, 49 Am. Rep., 800; *Richberger* v. *Express Company,* 73 Miss., 161, 18 South. Rep., 922, 31 L. R. A., 390.

Mayes & Longstreet, and *Chas. N. Burch,* for appellee.

In considering the issues of law here concerned, it is important to have clearly in mind the facts and the dates shown in the pleadings. The appellant filed his declaration on June 1, 1906, for recovery of damages from the appellee on account of certain alleged slanders averred by the declaration to have been uttered and published about him by one Sullivan, and others, employes of the appellee. The first count of this declaration alleged that Sullivan, in the employ of appellee, maliciously and falsely said, in the absence of appellant, and in the presence of several persons, concerning appellant, "I caught one man, the other day"; thereby meaning that appellant, whose duty it was to keep an account of work done by employes on the section force of which appellant was foreman in appellee's employ, had made false and dishonest entries in his accounts of the work of the employes on the force, and that by the slanderous statement mentioned appellant's reputation had been injured. The second count alleged that shortly after the time mentioned in the first count one Gilleas, an employe of the appellee, acting within the scope of his employment, stated to different persons, in appellant's absence, that appellant was guilty of the charge made against him by Sullivan, to the injury of appellant's reputation.

It was patent that this declaration charged no legal offense against the railroad company, the only averment being that, in one instance, an employe of appellee said, "I caught one man, the other day," and, in the other instance, another employe of appellee said that the charge made by Sullivan against Rivers was true. There was nothing in the body of the declaration to indicate how and of what Sullivan had "caught him,"

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or of what charge if any the other employe had said appellant was guilty. There was nothing in the words themselves that was defamatory or slanderous, for they charged no criminal or injurious offense against the appellant. It was so obvious that the declaration charged no offense specifically against the railroad company on which recovery could be had, that the appellant filed an amended declaration before any defense was attempted by appellee.

The amended declaration was filed October 31, 1906, practically four months after the plaintiff filed his first or original declaration. And this amended declaration was thus filed over a year from June, 1905, the date of the alleged libelous and slanderous statements shown in the four counts of the amended declaration.

In and by the first count of this amended declaration the appellant complains that the said Sullivan, on the 7th day of June, 1905, addressed a communication to Safford, chief engineer; Gilleas, roadmaster, and Daley, chief time checker, in regard to his investigation of Section No. 2, at Pocahontas, J. R. Rivers, foreman, which appellant avers "constituted a libel upon plaintiff in and about his occupation aforesaid."

By the second count of this amended declaration, appellant complains that the said Sullivan, the time checker of the Louisiana division, had maliciously and falsely stated in the presence of another, that he had caught the plaintiff "stealing and had been compelled to write him up"; "that it was a plain case of stealing, and there was nothing for him to do but to write him up." It was also averred that when these statements were made, the said Sullivan was acting within the scope of his authority and in and about the business of the appellee as its agent and servant.

By the third count of this amended declaration, it is claimed that one Gilleas, who was then roadmaster of the Louisiana division of the railroad, did maliciously and falsely say in the

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office of the appellee at Jackson, Mississippi, in the presence and hearing of another, "The —— of —— is stealing, and I want him discharged."

By the fourth count of the declaration, the plaintiff alleges that on the 7th day of June, 1905, the said Gilleas, roadmaster, who was then and there representing appellee and acting within the scope of his authority, did maliciously and falsely, say in the presence and hearing of another, and of John Maynor, one of the supervisors of appellee, that one Sullivan, time checker, and one Maynor, supervisor, of the appellee over appellant "went over the Yazoo district of the defendant company's road a few days prior to the date aforesaid, and while in and about defendant's business, "caught two men stealing and one of them had been in the service of the company (meaning Rivers, the plaintiff), about twenty years, and that he was section foreman at Pocahontas."

It is charged in each count that the allusions were to appellant, and that he was the person referred to in and by each and that each and all of them brought him into disrepute and caused him distress of mind which produced sickness, ill health, etc.

To this amended declaration, the appellee filed certain special pleas, the first denying that the railroad company wrote or published words set forth in the first count of the declaration; the second plea denying that the words written and published as set forth in the count bear the construction put thereon by Rivers, the appellant, and the third special plea to the first count set up the statue of limitations and averred that the cause of action did not accrue within one year of filing the amended declaration, and that the same is barred by the statute of limitations.

The railroad company demurred to the second, third, and fourth counts of the amended declaration, on the ground "that said counts are for alleged slander by an employé of defendant, and it now here appears in said counts that such alleged slanderous words were uttered and published with the knowledge of

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the defendant, or with its approval or consent, or that the same were ever ratified by the defendant."

The court will bear in mind here that in this state of the pleadings, there was a plea setting up the statute of limitations and the statutory bar of one year against the alleged libel based on the letter alleged to have been written by Sullivan on the 7th day of June, 1905; that there was a demurrer to the remaining counts assigning the grounds just recited.

After the filing of these pleas and this demurrer, the appellant, Rivers, by his attorneys, demurred to the special plea setting up the statutory bar of one year.

At the hearing of these demurrers, the court overruled the demurrer to the special plea setting up the statute of limitations, and also at the same time sustained the railroad company's demurrer to the second, third, and fourth counts of the declaration. After the action of the court in overruling River's demurrer and sustaining the railroad company's demurrers, as above explained, the appellant declined to plead further, and judgment final was entered in behalf of the railroad company.

The action of the court below in overruling appellant's demurrer to the special plea setting up the statute of limitations, in bar of recovery on the first count of the declaration, was eminently correct. Code 1906, § 3102, which is a rescript of Code 1892, § 2742, expressly provides, amongst other things, that, "All actions for slanderous words concerning the persons or title, and for libel, shall be commenced within one year next after the cause of such action accrued and not after." The cause of action averred in the first count of the second or amended declaration, consists in the alleged libel growing out of the letter from Sullivan, the time checker, to his superior officers. The amended declaration alleges that this libel was perpetrated on the 7th day of June, 1905, and the amended declaration was not filed until October 31, 1906, a period of fifteen months after the date plaintiff alleged the libel was committed.

Learned counsel for appellant will undoubtedly insist that

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the filing of the first or original declaration on June 2, 1906, was a commencement by Rivers of his suit against the railroad company, and that the charges made in the amended declaration will relate back to the date of the institution of the suit, and that as this was within the twelve months, the charges for the first time propounded by the amendment will be saved from the bar of the operation of the statute. To this proposition, we beg to enter our most earnest dissent. Under no rule of pleading can the charge made by the first count in the amended declaration, where for the first time in the whole proceedings a charge of libel is made, be related back to the original declaration. We beg to call the attention of the court especially to the fact that in this first declaration there is no pretense of any charge except that of *slander,* slander by Sullivan, while the charge made in the first count of the amended declaration is not a charge of slander founded on alleged spoken words, but is a distinct and separate charge of *libel* founded on a writing which for the first time is mentioned in the amended declaration. The existence of such a writing is not even hinted at in the original declaration. The charge of libel is not even suggested in that declaration. It is a new, original, distinctive cause of action propounded for the first time at the time of the filing of the amended declaration.

The charge made in this first count of the amended declaration, by no sort of implication, is even remotely contained in or hinted at in a single word or phrase of the original declaration. It is totally unlike in character, and in large part controlled by different rules and principles. It would be difficult to conceive of two rights of action more entirely dissimilar than the alleged rights set out in the original declaration, and that founded on the writing referred to in the first count of the amended declaration. We have examined many authorities, some of which we cite below, bearing on the proposition that a new right of action cannot be so asserted by an amendment to an original bill in chancery or to a declaration

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at law, so as to avoid the application of the statute of limitations when the new cause of action set up is essentially a new right for the first time asserted by the amendment. We find no better authority for the proposition that the statute of limitations may be pleaded and will be effective against a new right of action brought forward in this way by an amendment to bill or declaration, than is found in the decision of our own court in the case of *Cox* v. *American Freehold & Land Mortgage Co.*, 88 Miss., 89, 40 So. Rep., 741. The decision of our court in the case just cited is but a succinct statement of the general rule deducible from an almost unbroken line of Mississippi authorities. These are compiled in the learned opinion in the case.

In the case of *Cooper* v. *Allen*, 57 Miss., 696, the bill was to foreclose a mortgage for plantation supplies, and afterwards it was amended so as to assert a lien under the married woman's statute which makes the husband the statutory agent, and the court held that the right attempted to be set up by the amendment, was barred.

In *Dinkins* v. *Bowers*, 49 Miss., 219, though the action was by a mechanic on account to enforce his claims though in the form of a purely personal action and when the mechanic attempted to amend by alleging a mechanic's lien based on the facts set out in the declaration, the court held that the assertion of the mechanic's lien was barred because it had not been set up within six months after the maturity of the account.

And so, also, in the case in the supreme court of the United States, of *Railway Co.* v. *Weyler*, 158 U. S., 285 (39 L. Ed., 983), though the action was based upon the general law of master and servant, and was for the recovery of damages for personal injury, yet when the plaintiff sought to claim under the statute of another state by an amendment setting up that statute, the court held that his right was barred because he had not asserted his right within the time prescribed by that statute.

And in a recent case of *Nelson* v. *Bank of Montgomery*

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(Ala.), 36 South. Rep., 707, the declaration claimed originally for money had and received, but afterwards plaintiff filed an amendment claiming for goods, wares and merchandise sold; and yet the court held that this claim could not be brought forward by amendment so as to avoid the statute of limitations applicable to statutes for goods, wares and merchandise sold and delivered.

We submit the argument on this proposition with these authorities, deeming it unnecessary to argue to this court that a charge of libel founded on a writing can in no wise be contained within a charge of slander based on alleged spoken words of entirely different import.

We now come to the question whether or not the demurrer of the appellee company to the second, third and fourth counts in the amended declaration was good and sufficient in law.

This demurrer set up as the substantial objection to the several counts, that nowhere in those counts was it charged that the alleged slanderous words spoken of the appellant, Rivers, were used by an employe of the corporation authorized to speak them on behalf of the corporation, and that it was not averred that the corporation had knowledge of such words or had ever ratified or approved the language of the employe. We respectfully submit to the court that a close analysis of these several counts will demonstrate that they are fatally insufficient in legal averment. Pretermitting, for the time being, the question whether or not a corporation is liable for the slander by an employe of a third person, we can say that even if the principle be conceded (which it is not), this amended declaration is insufficient in necessary averment.

In the first place, we take it as a settled rule that there is a difference between the rules and principles controlling in libel against corporations and those in alleged slander. This difference has been recognized by our own court in the case of *Railway* v. *Brooks,* 69 Miss., 168, 13 South., 847, wherein COOPER, Justice, says (referring to an instruction): "It told the jury

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that the circumstances created a qualified privilege, and that the defendant could only be liable upon proof of malice, or in the absence of honest belief in the truth of the statements contained in the letter. In other words, that the defendant was not liable if its servant in making reply to the letter of the attorneys kept himself within the privilege of the occasion, but was liable if he took advantage of the opportunity afforded by the occasion to maliciously libel him, or to write concerning him libelous matter which he did not believe to be true."

The rule is even more rigid when applied to a charge of slander. When liability for this offense is charged against a corporation under the doctrine of *respondeat superior,* it must be distinctly averred that the slanderous words were uttered by the employe in the course of his discharge of duty or transaction of business, that they were spoken maliciously and that the servant speaking them concerning another servant, knew the charges were not true. In other words, the speaking of the words must have been part of the authorized duty of the servant uttering them.

This court will readily perceive, as many courts have, the great hardship that would be visited upon a corporation if it should be broadly declared that a corporation or the master is liable for damages on account of alleged slanderous words spoken by one employe against another.

Many of the subordinate railway agents and employes are rough people, untrained in the amenities of life, and not observing the rules of decorous speech in conversation one with the other, nor in allusions to one another. This very fact is evidenced by the alleged slanderous statements set forth in the amended declaration. The courts hold, where it is patent the alleged slanderous statement is a mere individual expression of opinion on the part of a subordinate servant, made without the knowledge or approval of the corporation, that the expressions are personal expressions of the servant uttering them, for which he may be individually liable, but for which there is no liability

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Brief for appellee.

on the principal. The consideration of the alleged slanders set forth in this amended declaration would show that it was utterly impossible for the railroad company to ever have knowledge of the expressions used by these employes about one another, and it would be a rule which would open the door wide to fraud and connivance amongst employes to mulct corporations if it should ever be held to be the rule of law that a corporation is bound for every improper remark made by an employe concerning another when the speaking of words is not within the authority, express or implied, of the servant, and when the words bear on their very face the character of mere personal and individual opinion.

It was for a long time thought that a corporation could not in any case be held civilly liable for a slander. But at the present time the better doctrine would seem to be that, while a corporation is not ordinarily liable for a slander uttered by one of its agents, even though in uttering such words the speaker was acting for the benefit of the corporation and within the scope of the duties of the agency, the corporation may be held liable where it affirmatively appears that the agent was expressly directed or authorized by the corporation to speak the words in question. 18 Am. & Eng. Ency. Law (2d ed.), 1057.

Where a plaintiff desires employment with defendant railroad company to look after trucking when of his own accord the defendant superintendent, who had charge of employing persons for such work, and the superintendent in addition to stating that he did not want him, slandered him in regard to his former work for the company, defendant is not liable for the slander, there having been no such relation between them that the defendant owed plaintiff any special duty, and slandering plaintiff not being within the implied authority of the superintendent. *Sawyer* v. *Norfolk & S. R. Co.*, 54 S. E. Rep., 793, and see 10 Cyc., 1216; *Behre* v. *Cash Register Co.*, 27 S. E. Rep., 986; Townsend on Slander, § 265.

We, therefore, contend that the declaration in this case is

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fatally defective, on the demurrer now under consideration, for these reasons:

1. Because a corporation cannot be made liable for slander uttered by an employe unless the words were uttered in the course of business and unless the employe was authorized to speak the words in and about the transaction, these or like words.

2. Because the averment is fatally insufficient in that it does not aver that the corporation had knowledge of the words and authorized or ratified them.

3. Because the declaration is fatally insufficient in that it does not aver that the employe who used the words did not use them in the course of duty which covered the expressions with a general or qualified privilege.

4. Because the allegations are fatally insufficient because they do not aver that the employe, who is alleged to have used the words, did not know or believe them to be true.

5. Because the declaration does not aver that the words were uttered by the employes outside of the line of duty or to third persons whose duties did not include the duty of having a discussion concerning the circumstances complained of. In other words, we contend that while there is an allusion to third person here in whose presence some of the words were alleged to have been uttered, there is no allegation that this person was not an employe of the company charged with a duty in and about the transaction in hand. An action for slander and libel is in the nature of a criminal prosecution. It is *quasi*-criminal procedure even when only punitory damages are sought, and by all the rules controlling in such actions, the pleadings are construed most strongly against the pleader, and the pleader must negative in the declaration every allegation which, if true, would absolve the corporation from liability.

WHITFIELD, C. J., delivered the opinion of the court.

The action of the court below in overruling the demurrer of

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the plaintiff to the defendant's third plea is affirmed; but the court below erred in sustaining the demurrer of the defendant to the second, third, and fourth counts of the amended declaration. The doctrine has long been exploded that a corporation is not liable for slander because, as it was ridiculously expressed, there could be "no agency to slander." The true doctrine is that set forth in Clark & Marshall on Corporations, vol. 1, pp. 627–629: "It has been said that corporations cannot be liable for slander or oral defamation by officers or agents, as 'there can be no agency to slander'; and the opinion has also been expressed that a corporation, because of its impersonal nature, cannot commit torts involving elements of malice, since, to support an action for tort, 'it must be shown that the defendant was actuated by motive in his mind, and a corporation has no mind.' This reasoning, however, is unsound. The corporation, it is true, has no mind. It cannot itself entertain malice; but its officers and agents may, and their mental attitude, including the malice, may, like their consent to contract, or their physical acts, be imputed to the corporation. It is well settled, therefore, for this reason, that corporations might, to same extent as natural principals, be liable for malicious wrongs of their officers or agents, if committed in a transaction which is in the scope of their authority. Thus it has been held that corporations to the same extent as individuals, are liable for action of libel, or, it seems, for slander, or in action for malicious prosecution, or false arrest, or imprisonment. While it is true that a corporation cannot itself speak, and therefore it cannot itself slander, neither can a corporation itself make false representations of its agents. For the same reason, it may be liable for slander by its agents." The same principle is announced by this court in the case of *Williams* v. *Planters' Insurance Co.*, 57 Miss., 759, 34 Am. Rep. 494. Lord Mansfield very accurately said in the case of *Maloney* v. *Bartlett,* 3 Camp., 210, that "there appeared to be no well-founded distinction between written and unwritten slander," and that "the reasons given

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in the books for such a distinction were very insufficient." He further said that the first reason given was that by writing the scandal became more diffused, but that this was casual, for words might be spoken under circumstances which would give them much more publicity and render them much more injurious than if they were committed to paper and shown to third persons. He further said that "as to another reason, that the writing of scandal shows more malice against the defendant, the true foundation of civil actions was some damage sustained by the plaintiff, not the malice which actuated the defendant." This great judge was eminently correct in holding that no sound distinction can be drawn between the liability for libel and the liability for slander. It is further to be observed that the case of *Childs* v. *State Bank,* 17 Mo., 213, was disapproved in the case of *Williams* v. *Planters' Ins. Co., supra,* and in the case of *Iron Mountain Bank* v. *Merchants' Bank,* 4 Mo. App., 505, it was shown that since the *Childs case* there had been a complete change in the law on this subject in Missouri and elsewhere. It is very correctly pointed out in the brief of the learned counsel for appellant that 18 Am. & Eng. Ency. of Law (2d ed.), p. 1057, cites Townsend on Slander, and that Townsend on Slander cites the case we have just referred to of *Maloney* v. *Bartlett,* which, so far as its reasoning is concerned, supports the appellant. The case holding the appellee's view, *Owsley* v. *M. & W. R. R. Co.,* 37 Ala., 560, was overruled by *Jordan* v. *A. G. S. R. R.,* 74 Ala., 85, 49 Am. Rep., 800. We think our own cases of *Railroad* v. *Brooks,* 69 Miss., 185, 13 South., 847, 30 Am. St. Rep., 528; *Williams* v. *Planters' Ins. Co.,* 57 Miss., 579, 34 Am. Rep., 494, and *Richberger* v. *Express Co.,* 73 Miss., 161, 18 South., 922, 31 L. R. A., 390, 55 Am. St. Rep., 522, are decisive in favor of appellant's contention. See also, *Sawyer* v. *Norfolk S. R. Co.* (N. C.), 54 S. E. 793; *Bacon* v. *Mich. Central R. R. Co.,* 21 N. W. 324, 55 N. W., 224, 54 Am. Rep., 372; and *International Co.* v. *Heartt,* 136 Fed., 129, 69 C. C. A., 127.

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Opinion of the court.

The test is whether the slanderous words were spoken by the agent of the company while acting within the scope of his employment and in the actual performance of the duties of his principal touching the matter in question, as pointed out in the *Richberger case* above. We have nowhere found a better statement of the true doctrine on this subject than that announced by BRICKELL, C. J., in his masterly opinion in the case of *Jordan* v. *Ala. Great Southern R. R. Co.*, 74 Ala. 85, 49 Am. Rep., 800, cited *supra*. That great judge said: "The idea that a corporation is not liable for a tort involving a malicious intent had origin in the day when it was denounced as soulless, and was an application of the quaint syllogism, ascribed by Lord Coke to Chief Baron Manwood, that 'none can create souls but God, but a corporation is created by the King; therefore a corporation can have no soul.' The current of authority now is that corporations are responsible civilly, the same as natural persons for the torts of their agents committed in the course of their employment, or which are authorized, or subsequently ratified. Ang. & Ames, Corp., secs. 385–389; Morawetz on Private Corporations, secs. 89–96; Cooley on Torts, 119–123; *Southern & N. A. R. Co.* v. *Chappell*, 61 Ala., 527. The immunity from individual liability afforded by corporate organization, the capacity for the concentration and employment of intelligence, energy, and capital, without break or interruption because of changes in membership, has led to the multiplication of corporations, until there is scarcely an object of general concern a corporation is not formed to promote, and to a great extent they have engrossed business in all hazardous enterprises or enterprises requiring the investment and use of large capital. 'With the multiplication of corporations,' said ROGERS, J., in *Bushel* v. *Com. Ins. Co.*, 15 Serg. & R. (Pa.), 176, 'which has been and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them.' And he adds: 'The change in the law has arisen from a change of circumstances—from that silent legis-

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lation by the people themselves, which is continually going on in a country such as ours, the more wholesome because it is gradual and wisely adapted to the peculiar situation, wants, and habits of our citizens.' . . . It is the aim and duty of courts to apply principles of the common law, with such modifications as are necessary to adapt them to the changed necessities, varied social conditions, and diversified business and interests of the community. Perhaps, there is not, in the history of the common law, more distinctive evidence of its modifications, of the rejection of its narrow technicalities, than in the adaptation of the legal relation of corporations to a just liability for the acts, omissions, or engagements of the governing body, or its agents or servants employed in the transaction of corporate business. The ancient rule, that they could speak and act only through the common seal, is obsolete; and now they are bound by the like implications and inferences which bind natural persons." Chief Justice BRICKELL then quotes approvingly the following language of Mr. Justice CAMPBELL in the case of *P., W. & B. R. R. Co.* v. *Quigley,* 21 How. (U. S.), 210, 16 L. Ed., 73: "But these agents may infringe the rights of persons who are connected with the corporation, or who are brought into relations of business or intercourse with it. As a necessary correlative to the principle of the exercise of corporate powers and faculties by legal representatives is the recognition of a corporate responsibility for the acts of those representatives. . . . The result of the cases is that for acts done by the agents of a corporation, either *in contractu* or in *delicto,* in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances." Chief Justice BRICKELL then concludes as follows, citing a great number of authorities: "We have among us, not only purely domestic corporations, but corporations existing by the separate authority of several states, drawn into the daily transaction of business with all classes of the community, holding property of

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every species under the protection of the law of the state, compelled to a frequent resort to the courts for prevention or redress of injuries. Foreign corporations, by a liberal comity, here exercise corporate power, transact business, hold and enjoy property. It is by the representation of natural persons that their franchises are exercised, their business transacted, and property acquired. It would not be just, if a natural person suffer wrong from the malicious acts of the representative of a corporation, while within the scope of his employment, for the courts to refuse to look beyond the legal entity to its real and true character, an association or aggregation of natural persons, capable of acting by a corporate name and in continuous succession. This is not unjust to the corporation, for it 'tends to induce greater care and caution in the selection of those who are to be intrusted with corporate affairs.' "

The demurrer of the defendant to the second, third, and fourth counts of the amended declaration is overruled, the judgment is reversed, and the cause remanded.

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Statement of the case.

EDWARD D. PEIRCE v. KINGSTON LUMBER COMPANY.

[43 South., 81.]

MORTGAGES. *Satisfaction. Entry of record. Mortgagor's liability. Code* 1892, § 2451 (*Code* 1906, § 2781).

In an action arising under Code 1892, § 2451 (Code 1906, § 2781) to enforce the liability of a mortgagor who has failed, after request, to enter satisfaction on the record of the mortgage, it is no defense to show that the mortgage describes the property with reference to a survey and omits to mention the block in which the lots described by number are located, though the survey includes more than one block containing lots so numbered.

FROM the circuit court of Jones county.

HON. ROBERT L. BULLARD, Judge.

Peirce, the appellant, was plaintiff in the court below, and the Kingston Lumber Company, the appellee, was defendant there. From a judgment in favor of the defendant the plaintiff appealed to the supreme court.

The suit was for the recovery of statutory damages because of the failure of the defendant, a domestic corporation, to comply with Code 1892, § 2451, requiring a mortgagee or *cestui que trust* of real or personal estate, after payment of the debt secured by the mortgage or deed of trust, to enter satisfaction upon the margin of the record of such mortgage or deed of trust; and providing that "if such mortgagee or *cestui que trust,* by himself or his attorney, shall not, within one month after request, make such acknowledgment of satisfaction, the person so neglecting or refusing shall forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by action." Plaintiff's declaration alleged that one Hambright executed to one McCallum, as trustee for the use of the defendant, a deed of trust on "lots 1, 2, 11 and 12 of Edgewood Addition to the town of Laurel, Mississippi," the

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Statement of the case.

same being of date of January, 1902, and of record in Book S, on pages 287 and 288 of the deed records of the county, to secure a debt of $849.76; that after the maturity of this debt the plaintiff, Peirce, purchased the lots mentioned, and paid to the trustee for the defendant the said sum with interest, and, after payment, requested the defendant orally to enter satisfaction of the deed of trust upon the margin of the record, and subsequently after the passage of more than two years, on his discovery that the record still appeared uncancelled, wrote to the defendant as follows:

"LAUREL, MISS., July 12, 1904.

"*Kingston Lumber Company, City.*

"GENTLEMEN: I beg to call your attention to the fact that the deed of trust formerly held by you against R. L. Hambright on lots 1, 2, 11 and 12, Edgewood Addition, town of Laurel, and which I paid off more than two or three years ago, has never been satisfied by you upon the records of mortgages at Ellisville. You will find the mortgage recorded in Mortgage Record S, pp. 287 and 288. Please be kind enough to satisfy records without delay, and notify me when such satisfaction has been made, and oblige. Yours truly,

"EDW. D. PEIRCE."

The declaration, which was filed in 1905, alleged that the defendant had failed to enter satisfaction of the deed of trust upon the record, and demanded judgment for $849.76, the face of the mortgage debt. The defendant pleaded merely the general issue. On the trial the facts alleged in the declaration were proved by plaintiff. Plaintiff's evidence, however, disclosed that although the description of the lots in the deed of trust was as described in the above letter to defendant, the proper description should have been "lots 1, 2, 11 and 12 of Block G of the Edgewood Addition," etc. It was shown by a plat of Edgewood Addition in evidence that there were several blocks in such addition, many of which contained over twelve

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Brief for appellant.

lots. No actual damages were claimed or proved by plaintiff. At the close of the testimony for plaintiff the court, on the motion of defendant, excluded the evidence and instructed the jury to find for the defendant; the court's action being based upon the principle that the statute, being penal, should be strictly construed, and that the damages claimed by plaintiff were not recoverable under the circumstances of the case.

T. M. Miller, for appellant.

This case is to be determined by the question, whether or not a party entitled to demand the cancellation of a mortgage upon his property after payment of the mortgage debt need describe the property in his notice to the mortgagee otherwise than as it is described in the mortgage.

It is submitted that the court below was wrong in sustaining the defendant's motion to exclude plaintiff's evidence, even in view of the rule that statutes imposing penalties are to be construed with the greatest strictness.

There can be no doubt of the fact that so far as Hambright and the Kingston Lumber Company were concerned, Peirce became the absolute owner of the four lots which Hambright had acquired and owned and sold to Peirce, and Peirce was accordingly entiled to a cancellation of the deed of trust executed by Hambright to the Kingston Lumber Company. And it is equally certain that upon discovering the error of description in the deed of trust the Kingston Lumber Company could have compelled a reformation of the description so as to show the block intended.

Inasmuch as the deed of trust omitted the block but properly described the lots, it could only have been necessary for Peirce, in his written request, to mention the property as described in the deed of trust, calling attention to the deed book and page of the records. The Kingston Lumber Company was not concerned with an accurate description. It was advised that Peirce was buying the property, and it accepted payment

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Brief for appellee.

of the amount due to it under the deed of trust, and surrendered the deed of trust and note secured thereby, to Peirce.

Nothing in the doctrine of patent ambiguity has any relation to this case. The mortgage was upon property known to the appellee, and it was further known to appellee that the appellant, Peirce, had acquired the same and had paid to it the mortgage indebtedness.

Had Hambright himself, the mortgagor, paid off the encumbrance and called upon the appellee, the mortgagee, to satisfy the record, could the mortgagee be heard to say that while the encumbrance was valid, there should be no need to cancel the record inasmuch as a slight error existed in the description? Certainly the mortgagor, upon payment of the mortgage, had a right to demand that a satisfaction of the mortgage should appear of record, no matter how the description read. And Peirce, as his vendee, had the same rights under his purchase.

If there had been any possibility of the appellee's not understanding what it was required to do, this suit would never have been brought. But such was not the case.

Stone Deavours, for appellee.

The action of the lower court was clearly right. This is a suit for a penalty under the statute, and the old established rule is that statutes imposing penalties must be construed with the greatest strictness. Unless the plaintiff brings himself within the exact letter of the statute he is not entitled to recover.

It is shown by appellant's evidence that the description of the property in the deed of trust was void, as there were several lots in Edgewood Addition to which the description was applicable. The deed of trust did not accordingly constitute an encumbrance on the lots owned by Hambright, and the failure to cancel the deed of trust could not subject the appellant to a suit for the statutory penalty.

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Opinion of the court.

The fact that the deed of trust secured Hambright's note, and that the note was paid cannot help the appellant's contention. The note is a different thing from the deed of trust. The note evidenced a debt. The payment of that debt was a discharge of a duty resting upon Hambright, or upon appellant if he assumed the debt. This was a matter wholly separate and apart from a suit under the statute to collect a penalty.

CALHOON, J., delivered the opinion of the court.

On a declaration for damages under § 2451, Ann. Code 1892, it plainly appears that there were repeated requests to enter satisfaction of a trust deed which had been paid. Finally the request was made in writing, after two or three years of neglect and refusal, and this written request contains this, after reciting facts making the request of the writer proper, viz.: "You will find the mortgage recorded in Mortgage Record S, pp. 287 and 288. Please be kind enough to satisfy records without delay, and notify me when such satisfaction has been made, and oblige." This was dated July 12, 1904, and there were oral requests thereafter, and promises made to enter the satisfaction, but no compliance, and this action was brought in August, 1905. The trust deed describes the property as "lots 1, 2, 11, and 12 of the Edgewood Addition to the town of Laurel, Jones county, Mississippi." It omits the words "block G," and it is therefore urged that the record was void, and could not have been of damage to appellee. We cannot subscribe to this. The grantees were none the less bound to enter satisfaction of the particular record. As to the amount of recovery, another question might arise.

Reversed and remanded.

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Syllabus.

CALLICOTT NORFLEET ET AL., EXECUTORS, v. KATE CALLICOTT ET AL.

[43 South., 616.]

1. WILLS. *Code* 1892, § 4496. *Renunciation by widow. Rights of devisees.*

Where a testator devised his homestead to his widow and directed that a sum of money should be invested, the income therefrom to be paid her during her life or widowhood and at her death or marriage the money divided between her three children by the testator, and the widow renounced the will, as authorized by Code 1892, § 4496, the homestead became a part of the general estate but the money went to the three children named.

2. SAME. *Rights of devisees. Ademption of legacy.*

A devise of money is adeemed if after the writing of the will the legatee receive from the testator the sum of money named, executing a receipt in full for her interest in the estate, though the will remained unchanged.

3. SAME. *Advancement. Receipts. Relinquishment of right in estate.*

Where a testator during his life made advancements to his adult children, taking receipts from them in full of their interest in his estate, the receipts are in the nature of contracts and extinguish the rights of the parties giving them, and of their heirs, in testator's estate.

4. SAME. *Widow's right. Renunciation of will.*

Where three of six children of a decedent received advancements from him and gave contractual receipts extinguishing all their right in his estate, his widow by renouncing his will, under Code 1892, § 4496, authorizing such renunciation, became entitled to one-fourth of the estate.

5. SAME. *Descent and distribution. Statutory construction. Code* 1892, §§ 1545, 4496.

Code 1892, §§ 1545, 4496, the one section regulating the descent of property between husband and wife and the other providing for the renunciation of a will by the widow of the testator, must be construed together, and the word "child" as used in the former means such child as shall have a right under the law to share in the estate of his intestate father, and does not include children who have contracted away the right.

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Statement of the case.

FROM the chancery court of Tate county.

HON. JULIAN C. WILSON, Chancellor.

Norfleet and others, executors of the last will and testament of J. C. Callicott, deceased, were complainants in the court below; Mrs. Callicott, widow of the decedent, and others, the appellees, were defendants there.

From the decree of the court below, the complainants, the executors, appealed to the supreme court for the purpose of obtaining a conclusive decision of the questions involved.

The executors of the will of J. C. Callicott, deceased, after having paid all debts against the estate, filed a bill in chancery asking the court to construe the will on which they acted and to give them directions as to the proper distribution of the estate. By the provisions of the testator's will he bequeathed the homestead to his wife, Kate B. Callicott, and directed the executors to set aside the sum of $15,000 as a trust fund to be invested for the benefit of his widow during her widowhood or natural life, which sum upon her death or marriage was to be divided among his children by his said wife. The will recites that he had already given to his two children, Henry M. Callicott and Calloway Callicott, children by a former marriage, the sum of $30,000 each in full of their interest in his estate, for which he had taken their receipts. He then devised to his daughter, Minnie Boone, also a child by a former marriage, the sum of $16,000, which, in addition to that already given her, made the total of $30,000, as her portion of his estate. He died intestate as to the remainder of his estate. After the making of the will, but before the death of the testator, Minnie Boone received from him the sum of $16,000, devised to her in the will, and gave receipt in full for $30,000, her interest in the estate. The will, however, remained unchanged. Henry M. Callicott, one of the sons, to whom the testator had given $30,000 in his lifetime, died before the date of the will, leaving children. The widow renounced the will and elected to take a child's part in the estate.

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Brief for appellants.

The following questions were presented to the court for determination: (1) Were the children of Henry M. Callicott, deceased, cut off by his receipt for $30,000 from further participation in J. C. Callicott's estate? Or, Henry M. Callicott having died before the will was written, do his children inherit directly from the testator a share or portion of his property not devised or disposed of by his will? (2) The widow having renounced the will and having elected to take a child's share in the estate, the question arose as to what was a child's share under the facts in this case, there being six children in all, three by a former marriage and three by the last: Does the widow take a one-seventh interest in the property, or does the fact of the testator's having provided for his three older children in his lifetime, thereby excluding them from participating in the distribution of his estate, entitle her to a share equal to that of the three children by the last marriage, which would be a one-fourth interest? (3) What was the effect of the receipts given by the three children by the former marriage, and did these receipts bar them from further participation in the testator's estate?

The court below decreed that the legacy of $16,000 to Minnie Boone was adeemed in the lifetime of the testator, and that the receipts executed by her and by the two older sons for $30,000 each, in full of their interest in the testator's estate, barred them from further participation in the distribution of the testator's property; that the heirs of Henry M. Callicott should not participate in the distribution of the estate, because of the paying of the $30,000 to him in his lifetime; that the widow, Mrs. Kate B. Callicott, took a one-fourth interest in the property of the estate, being an interest equal to the share of each of the three minor children, and that the executors should distribute the property accordingly.

J. F. Dean, and *St. John Waddell,* for appellants.

The appellants are interested in the proper settlement of the

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Brief for appellee.

question of law which arises in reference to the performance of their duties, and as there are several minors interested in the estate, and the responsibility resting on them is very great, they excepted to the decree of the chancellor on the questions involved, and have appealed to this court for the purpose of obtaining a conclusive decision of the same and have assigned error accordingly.

N. A. Taylor, for appellee, Kate N. Callicott.

The chief question presented relates to the view to be taken of the contracts made by the testator with his three older children by his first marriage, viz.: Henry and Calloway Callicott and Minnie Boone, all adult married children. Are they contracts of release and settlement in full of their interests in his estate, as his heirs, in consideration of his present cash payment, and their acceptance of certain amounts as representing their full interest in his estate, and which exclude them from being considered in further distribution, as held by the chancellor; or are they mere receipts for such payments as advancements to them and which leave them free to share further in distribution upon accounting for the amount received and that as of the value when received without interest or accounting for profits derived from its use? If releases, are they valid and enforceable as such in equity in the distribution of the estate?

That these sums of money, $30,000 to each, were not made and received as mere advancements allowing these children to share further in the distribution of his estate in the event of his dying intestate, the only condition in which they would be of any force or in distribution among his heirs, is clearly shown by the papers themselves and the situation and surroundings of the parties that rendered the creation of such papers desirable or important.

If a mere advancement was intended, which is defined to be "an irrevocable gift *in præsenti* of money or property, real or

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Brief for appellee.

personal, to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift" (14 Cyc. B., 162), no such papers were required.

No participation or action on the part of an heir would be required in such case beyond the mere reception of the money or property advanced. He, in such case, need not sign any contract or relinquish or release any right he held as heir. He need not even know at the time the purpose for which the payment was made to him—whether as a gift or something he would be charged for and have to account for in the distribution or not. The father alone knowing this and the true character of the transaction appearing, then or later, as the father might intend and make manifest in any of a variety of ways.

Such is not, quite evidently, the transaction here disclosed between the father and his children in which both participate. Something more than a mere advancement of a certain amount of his estate on his side and its reception on theirs is shown. A contract is made that such payments were to be the full shares of these children in his estate.

The making of such a contract is utterly at variance with the idea of a mere advancement.

In advancements there is always existent, regardless of the amount paid, the possibility of the heir receiving more of the estate in case of the father dying intestate. He may not, in fact, receive more. The amount he has received in the parent's lifetime and the size of the estate to be distributed at his death may prevent it. But that is all that can defeat it. He has not lost or surrendered any right as heir to share in distribution, should the condition of the estate of his father at death intestate enable him to do so, and this is reserved and postponed for future consideration.

But in case of a release there is a present fixing and determination of the amount of the heir's share of the estate, the reception of which as such virtually extinguishes him as an heir of the estate. This was the precise end sought for in

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Brief for appellee.

this contract and constitutes the essential difference from an advancement. *Newsome* v. *Cogburn,* 30 Ga., 291; *Bishop* v. *Davenport,* 58 Ill., 106; *Kinney* v. *Tucker,* 8 Mass., 143; *Fitch* v. *Fitch,* 8 Pick., 479; *Nesmith* v. *Dinsmore,* 17 N. H., 575; *Parsons* v. *Ely,* 45 Ill., 232; Story's Eq. Jur., sec. 10406; *Havens* v. *Thompson,* 26 N. J. Eq., 383; *Kershaw* v. *Kershaw,* 102 Ill., 307; *Galbraith* v. *McLain,* 84 Ill., 379.

"An heir may release his expectancy in his father's estate in consideration of a present grant, and such agreement will be enforced, so that he cannot bring what he has received into hotchpot and get more in distribution." 2 Woerner's Law of Administration, *p. 1220, citing cases from Illinois, New Jersey, New Hampshire, Massachusetts, Indiana, West Virginia, California and Tennessee, as follows: *Kershaw* v. *Kershaw,* 102 Ill., 307; *Simpson* v. *Simpson,* 114 Ill., 603, 609 (4 N. E., 137, and 7 N. E., 287); *Green* v. *Hathaway,* 36 N. J. Eq., 471; *DeWitt* v. *Brands,* 10 Atl. R., 181 (6 Am. St. Rep., 909); *Quarles* v. *Quarles,* 4 Mass., 680; *Havens* v. *Thompson,* 26 N. J., 383; *Nesmith* v. *Dinsmore,* 17 N. H., 515, 517; *Brown* v. *Brown,* 139 Ind., 653; *Roberts* v. *Coleman,* 37 W. Va., 143, 155; *In re Garcelon,* 104 Cal., 570 (32 L. R. A., 595); *Gove* v. *Howard,* 94 Tenn., 577; *Coffman* v. *Coffman,* 41 W. Va., 8 (23 S. E., 523); also to the same effect, 20 Am. & Eng. Ency. L. (1st ed.), 750 and note 4 citing *Brands* v. *DeWitt,* 44 N. J. Eq., 545 (6 Am. St. Rep., 909); *Curtis* v. *Curtis,* 40 Me., 24 (63 Am. Dec., 651); *Crum* v. *Sawyer,* 132 Ill., 443—to the effect that relinquishment is for the benefit of the other heirs, and other cases.

"An heir at law may, for a sufficient consideration, release to his father a share which he might have at the parent's decease in his estate, either real or personal, so that he will be thereby estopped from establishing any claim thereto as one of his heirs at law or next of kin. Such releases, however, when they concern lands, are subject to the statute of frauds, and un-

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less they are in writing cannot be enforced." 24 Am. & Eng. Ency. L. (2d ed.), 30, and notes citing numerous cases.

"According to the weight of authority the release of an expectant share to an ancestor, in consideration of an advancement of further valuable consideration, excludes the heir from participating in the ancestor's estate at his death, provided the person executing the release was not obtained by means of fraud or undue influence." 14 Cyc., 91, and N. 8 and 9, citing numerous cases from Georgia, Illinois, Kentucky, Massachusetts, New Jersey, North Carolina, Pennsylvania and West Virginia, among them, *Barham* v. *McKneely,* 89 Ga., 812 (15 S. E., 761; *Newsome* v. *Cogburn,* 30 Ga., 291; *Simpson* v. *Simpson,* 114 Ill., 603 (4 N. E., 137, and 7 N. E., 287); *Kershaw* v. *Kershaw,* 102 Ill., 307; *Galbraith* v. *McLain,* 84 Ill., 379; *Bishop* v. *Davenport,* 58 Ill., 105; *Curtis* v. *Curtis,* 40 Me., 24 (63 Am. Dec., 651); *Truell* v. *Eastman,* 3 Metc. (Mass.), 121 (37 Am. Dec., 126); *Brands* v. *DeWitt,* 44 N. J. Eq., 545 (6 Am. St. Rep. 909); *Havens* v. *Thompson,* 26 N. J. Eq., 383; *Powers' Appeal,* 63 Pa. St., 443; *Coffman* v. *Coffman,* 41 W. Va., 118 (23 S. E., 523); *Roberts* v. *Coleman,* 37 W. Va., 143 (13 S. E., 482).

In re Garcelon, 104 Cal., 570, citing among the above cases (32 L. R. A., 595–605), there is a very full discussion of such contracts. While the transaction was not between father and child, as in this case, it was between an aunt and her heir-at-law —complainant—and in the elaborate discussion in the case and in the notes the validity of releases between father and children is fully considered. Most of the cases discussed are of such character.

In the leading case—notwithstanding the statutes in that state, California, to the effect that "a mere expectancy of an heir was not to be deemed an interest of any kind," and that it, "not coupled with an interest could not be transferred"—the court held that such statutes were merely declaratory of the common law on such subject and were never intended to over-

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Brief for appellee.

turn long established equitable principles sustaining such transactions, and quotes from Story Eq. Jur., vol. 2, sec. 1040 c, and Pom. Eq. Jur. (2d ed.), sec. 168, as follows:—

"So even the naked possibility or expectancy of an heir to an ancestor's estate may become the subject of a contract of sale or settlement; and in such cases, if made *bona fide* for a valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract." The court approves of such principle and discusses a number of cases—pages 602–603—*Bacon* v. *Branham,* 33 N. J. Eq., 614; *Havens* v. *Thompson,* 26 N. J. Eq., 383; *Brands* v. *DeWitt,* 44 N. J. Eq., 545 (6 Am. St. Rep.); *Bishop* v. *Davenport,* 58 Ill., 105; *Kershaw* v. *Kershaw,* 102 Ill., 307; *Crum* v. *Sawyer,* 132 Ill., 443; *Powers' Appeal,* 63 Pa., 443, as holding to the same doctrine. In the principal case the receipt or release by the heir is formal and full; but in a number of cases cited above and in those discussed in the notes it will be seen that they were held to be such though not as full as in the case before the court. The only essential element being the statement that the heir had received his full share of the father's estate.

The notes to the case in 32 L. R. A., 595–605 on the subject of the "Validity of transactions between an heir and his ancestor relating to the former's expectancy" will be found to be exceptionally full and able and as sustaining in the cases cited in nearly all of the states—with few cases to the contrary—the doctrine contended for in this case.

A. W. Shands, for appellee Flavia Callicott and C. G. Callicott.

At common law it is admitted by all parties that an expectant heir could not release his interest in the estate of his ancestor. The reason (and it is a plausible one) is that no man is heir to those living and it is possible that a child may not become the heir of his parent and therefore he has nothing to

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release. This is based upon the most elementary and fundamental principle known to the common law. That this is the rule at common law is universally conceded, as is set out in the beginning of the note on page 578, vol. 65, L. R. A., and I have not, although I have made diligent search of all the authorities, found anywhere an announcement that this is not the rule under the common law. This being true, I contend that without going further we are entitled to a reversal of this case, for it has been many times announced by our court that the common law of England, except where it has been changed by statute, is in force in the state of Mississippi. *Hemingway, Admr.,* v. *Scales,* 42 Miss., 1; *Hollman* v. *Bennett,* 44 Miss., 322.

Not only was this the rule at common law, and should therefore in the absence of any statute changing the rule in Mississippi be followed by this court, but it is also in this case the reasonable, just and right principle to be followed in order that equity may be done.

It appears that J. C. Callicott had in property not disposed of by his will, not needed for the expenses of the administration, and after payment of all specific legacies, the sum of $140,000 as to which he died intestate. It is now contended by Kate M. Callicott, the widow, who renounced the will, and by the guardian *ad litem* of the three minor children, that the other children, including Calloway Callicott, have no right to participate in the distribution of this fund, claiming in effect that Calloway Callicott was disinherited; and certainly for this court to hold that he is not entitled to share, the court must *ipso facto* hold that he was disinherited. Now let's see if he was. The will makes specific provision for the widow and specific provision for the three minor children, using the following language as to Calloway Callicott:—

"Item 4th. I have heretofore given to my two sons, H. M. and Calloway Callicott, the sum of $30,000 each, this being in full of their entire portion and interest in my estate evi-

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denced by their receipts which may be found with my papers in the safe at Veazey, Clark & Co., Coldwater, Miss."

The receipt is in the following language:—

"Coldwater, Miss., May 8th, 1899. Received of J. C. Callicott, my father, $30,000, in full of all claims and demands against him or his estate such as he may provide for me in his will."

The court's special attention is called to the fact that there is no residuary clause in this will. It is held by numerous decisions that disherison will never be worked except in cases where the property is given by the will to some one other than the heir, and it must be given by language that is express or it must be by necessary implication, and language so clear that an intention to the contrary cannot be presumed. *Coffman* v. *Heatnole,* 2 L. R. A., 848, which holds that a will revoking all other wills, made by the testator, and declaring that a certain son shall be excluded from participating in the estate because he has become heir to some other property, and the testator is about to make a final settlement giving him as much as the estate would pay to the other legal heirs, is not sufficient to exclude such son from participation in the estate, but is a nullity where no provision is made for giving the estate to anybody else. See also to the same effect: *Boisseau* v. *Aldridge,* 5 Leigh., 222; *Wright* v. *Hicks,* 12 Ga., 155, 56 Am. Dec., 457; *Doe* v. *Lanius,* 3 Ind., 441, 56 Am. Dec., 518 and notes on p. 521; *Blackman* v. *Gorden,* 44 Am. Dec., 241; *Hall* v. *Hall,* 2 McCord, ch. 269; *Roberts* v. *Ogbourne,* 37 Ala., 174; *Parish* v. *Parish,* 37 Ala., 591; *Cleveland* v. *Chamberlain,* 22 Md., 308; *Olmstead* v. *Olmstead,* 4 N. Y., 56; *Shutt* v. *Rambo,* 57 Pa., 149; *Bacon's Appeal, Id.,* 504; *McKenzie* v. *Jones,* 39 Miss., 203; *Steiner* v. *Kolb,* 57 Pa., 123; Wigram on Wills, p. 78.

The language in this will not being sufficient to disinherit, using the word in its technical sense, Calloway Callicott had a right to share in this property of which his father died intes-

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tate unless the receipt is operative to bar him. Upon this question there is a hopeless conflict of authorities in other states, but the question is virgin in Mississippi.

Holmes & Holmes, for the infant appellees.

(1) Acceleration of enjoyment of $15,000 legacy:—*Vance Estate* (Penn.), 12 L. R. A., 227; Page on Wills, secs. 737, 802; *Rawlins Estate,* 81 Iowa, 701; *Marvin* v. *Sedwith,* 111 Ill., 430; *Slocum* v. *Hagaman,* 176 Ill., 533; *Ross* v. *Ross,* 85 Md., 430; *Schoultz Estate,* 113 Mich., 592; 2 Law of Wills (Underhill), secs. 866, 878, note.

(2) Validity of Releases. 2 Am. & Eng. Dec. in Eq., 229; *Garcelon's Estate,* 104 Cal., 570, s.c. 32 L. R. A., 595 and notes cited; *Simpson* v. *Simpson,* 114 Ill., 603.

(3) Boone Legacy—Adeemed—more properly—Satisfied. Underhill on Wills, sec. 440; parol evidence always competent to show satisfaction of legacy by subsequent portion. Proof is full, clear and convincing.

Argued orally by *Herbert Holmes, N. A. Taylor, W. J. East, J. C. Holmes,* for appellees.

WHITFIELD, C. J., delivered the opinion of the court.

We have given this case the most careful consideration, and we think the learned chancellor below decided every point in it correctly. His decree is in the following words, so far as it relates to the points decided; the chancellor holding:

First: "That the proper interpretation and construction of the will of J. C. Callicott, deceased, is to the effect that said deceased by said will devised to his widow, the said Mrs. Kate B. Callicott, absolutely, the homestead and personal property as mentioned in his said will, and further devised her in trust the income from $15,000 during the term of her natural life or widowhood, and that at her death or marriage the same should go to his minor children, Lamar, Norfleet, and J. C. Callicott, as stated in said will, and that he made no other dis-

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position of any other property owned by him in his said will, except the legacy of $16,000, which he therein bequeathed to his daughter, Minnie Boone, and that, his said widow having renounced said will, its only effect is to devise said $15,000 to his said three minor children; said legacy for $16,000 having been adeemed as hereinafter mentioned, and said homestead reverting to and becoming a part of his general estate."

Second. "It further appears to the satisfaction of the court that the evidence introduced establishes conclusively the fact that said testator, J. C. Callicott, in his lifetime adeemed the legacy of $16,000 bequeathed to his daughter, the said Minnie Boone, in said will, by paying to R. B. Lawler, for her, said sum of $16,000 on the purchase of a plantation in Bolivar county, Miss., which it is shown by the evidence was purchased and a deed to same being taken in the name of her and her husband, to be by them conveyed to their children then living and to any other children which might be thereafter born to her, and that in so paying said money he did so with the knowledge and consent of the said Mrs. Minnie Boone, for the purpose of adeeming said legacy and extinguishing same; and it is therefore hereby decreed that said legacy of $16,000, as devised to said Mrs. Minnie Boone in said will, was adeemed by said testator in his lifetime, and forever satisfied and discharged, and the executors of said will, who are complainants herein, are directed not to pay said legacy, but to disregard it in the further distribution of said estate."

Third. "It further appears to the satisfaction of the court from evidence in this case that said testator in his lifetime paid to each of his three children by a former marriage, to-wit, Calloway Callicott, Henry M. Callicott, and Minnie Boone, the sum of $30,000 each in full settlement and extinguishment of all their right to and claim against him as heirs to his said estate, and to all further interest in and demands against his estate, and as distributees of same after his death, and that the different receipts introduced as evidence herein by the executors

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were in the nature of a contract between said testator in his lifetime and said three children to this fact, and were so accepted by them, and have been so acted on by him, and for that reason he failed to make any residuary clause in his said will, and died intestate as to all his estate except that above mentioned, which he specifically devised therein, and that by so paying said money to said three children and taking their receipts for same, evidencing same, he extinguished all their right or claim against his estate as heirs thereto, and that they and each of them are forever estopped from setting up or claiming any further rights in his estate as heirs of same or as distributees thereof, and that they, the said Mrs. Minnie Boone, and defendant Mrs. Flavia Callicott and C. G. Callicott, the widow and only child of Calloway Callicott, deceased, Mrs. Jessie Townsend, Mrs. Lillian House, and Macon and Arthur Carver Callicott, former widow and only children of Henry M. Callicott, deceased, are not to be regarded or counted in the distribution of said estate as heirs of J. C. Callicott, deceased, or distributees of his estate, and that they, nor either of them, do take any interest whatever in the estate of said testator now in the hands of said executors to be distributed. All of which is decreed, and said executors are directed not to distribute anything from said estate to either of said defendants, the said Minnie Boone, Mrs. Flavia Callicott, C. G. Callicott, Mrs. Lillian House, Mrs. Jessie Townsend, Arthur Carver Callicott, and Macon Callicott."

Fourth. "It is further ordered and decreed that defendant Mrs. Kate B. Callicott, the widow of said testator, is entiled to, and her interest in all the estate which the said testator died seised and possessed of be, and the same is hereby, fixed and decreed to be, an undivided one-fourth part thereof after the payment out of said estate of the costs and expenses herein and hereafter mentioned, and that, after this one-fourth interest of said defendant Kate B. Callicott is paid to her, then that there shall be set apart from the remaining three-fourths of the assets

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of said estate the sum of $15,000, which shall be paid over by said executors under the will to the guardian of said three minor children of the testator, to-wit, Lamar, Norfleet, and J. C. Callicott, same to be held by said guardian for said three minor children under the terms of said will, and that after the payment of said $15,000 the remainder of said undivided three-fourths interest in all of the assets of said estate is hereby decreed to go to said three minor defendants, Lamar, Norfleet, and J. C. Callicott, share and share alike. This will disposes of all the assets belonging to the estate of said testator and now in the hands of said executors, and the interest in said assets of the said Kate B. Callicott, and of her three minor children, Lamar, Norfleet, and J. C. Callicott, in the same case, is hereby fixed accordingly, and said executors are authorized and directed by the court to distribute the same to them accordingly in making final settlement of said estate, taking their proper receipts for same, paying over the interest of said three minors to their guardian."

Section 4496 of the Annotated Code of 1892 and section 1545 of the same code must be construed together. The word "child" in section 1545 means such child as shall have a right under the law to share in estate left by his intestate father. It can never, in a case like this, include children who have been portioned off, and who have contracted with their father by written releases that they have no further interest in his estate.

In the foregoing decree all the points here brought into contest are presented and correctly decided. Wherefore the decree is affirmed.

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Statement of the case.

FED GRAY v. STATE OF MISSISSIPPI.

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[43 South., 289.]

CRIMINAL LAW AND PROCEDURE. *Homicide. Trial. Remarks of court. Argument.*

On appeal from a conviction of manslaughter prejudicial error cannot be predicated of the fact:—

(*a*) That the trial court inquired in the hearing of the jury, it being proposed to introduce in evidence a garment worn by defendant when arrested, "How could the witness know it was not chicken blood on the garment?", the same not then having been identified and there being no evidence that it was bloody, or if bloody, where the blood came from, especially where the defendant subsequently testified that the garment was his and that it was stained with decedent's blood; or

(*b*) That the prosecuting attorney inadvertently made certain memoranda on the back of an instruction for the state which the jury had while deliberating on the case, it appearing that the jurors did not read the memoranda; or

(*c*) That the prosecuting attorney in his argument said—there being evidence of which to predicate the statements—that the accused was as guilty as he could be; that he was a bloody assassin; that accused was an athlete and sprang to his feet and shot deceased in the back of his head and then shot another person; that accused murdered decedent in cold blood, and called on the jury whether they would put a stop to the homicides of which three or four had been committed within the last few months by negroes, and that the proof showed that accused had not lived with his wife for two years.

FROM the circuit court of Leake county.

HON. JAMES R. BYRD, Judge.

Gray, the appellant, a negro, was indicted for manslaughter, the killing of one Newton Wallace, a man of color; was tried, convicted of manslaughter and sentenced to the penitentiary for ten years, and appealed to the supreme court. The facts are stated in the opinion of the court.

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Brief for appellant.

McMillan & Howard, and *O. A. Luckett,* for appellant.

Appellant, a poor and helpless negro, was entiled to a fair and impartial trial, and to the same consideration of his interests as would be due to any other man, white or black; and his case should not have been prejudiced in the minds of the jury by the remarks of the presiding judge, which were unfair, uncalled for and unreasonable. A casual consideration will show that these remarks were calculated to prejudice the minds of the jury against the defendant, and to cast a doubt and suspicion over his defense.

No one denies that it is reversible error for the court to charge a jury on the weight of the evidence. Yet, the abrupt remarks of the judge of the trial court, made in the presence of the jury and during the trial of the case, and in reference to the unworthiness of certain testimony, would have a more damaging effect than if the judge had openly charged the jury by written instruction on the weight of the evidence. The average jury considers that the court's every statement is most important; that the judge is infallible. It makes no difference what the intention of the lower court was in making the remarks, the effect on the jury was to the prejudice of the defendant's interests. No subsequent explanation or instruction was given to the jury as to their not regarding these remarks, hence the error remained, without correction, throughout the remainder of the trial.

In support of our position as to the remarks of the court in the presence of the jury, we cite the case of *Montgomery* v. *State,* 85 Miss., 330, 37 South., 835, where, in the court's opinion, it is stated as follows: "Underholds and blows beneath the belt should never characterize trials, especially trials involving life or liberty. A court should so deport itself that no juror nor bystander can surmise its views of the facts. An unbiased jury alone should pass upon the facts."

The lower court erred in permitting Hon. Presley Groves, associate counsel for the prosecution, to make damaging and

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Brief for appellee.

unwarranted statements in his argument of the case before the jury. The jury alone are the sole judges of the evidence, and, we submit, counsel for the state should never be allowed to thrust their own opinions as facts before the jury, in arguing the case, especially when there is no evidence of which to predicate the remarks. There is no necessity to refer to authorities to show that arguments of counsel should not extend to things without the record. The learned associate counsel for the prosecution, in the closing argument, charged the defendant with "being as guilty as he could be," characterized him as "a bloody assassin," and further dragged in before the jury the blood-boiling race issue for consideration, calling upon the jury to know if they would not put a stop to the numerous homicides which were constantly occurring in the neighborhood, and which were committed by negroes. His remarks, in substance, were, that defendant was a bloody assassin, whose race was murdering people all over the country; that three or four people in the neighborhood had been murdered within the past three or four months, and for this reason the defendant should be found guilty. It was unfair to the defendant to have the outrages committed by others of his race, heaped upon him by the statements of the counsel for the prosecution.

In *Martin* v. *State,* 63 Miss., 505, it was held by this court that the unsworn statements of counsel against the accused, which if offered as evidence would have been incompetent, constituted reversible error.

R. V. Fletcher, assistant attorney-general, for appellee.

It was made a ground of motion for a new trial, and here assigned for error, that the judge of the lower court made some remarks in the presence of the jury about the possibility of blood upon appellant's shirt being chicken blood. This remark was made in ruling upon the competency of a witness' testimony in regard to the shirt. It was before the shirt was identified, in fact before it was shown that there was blood upon

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Brief for appellee.

the shirt, or from where the blood came. The remark meant nothing except that the court's view of the law was that the presence of the blood must be accounted for and explained. Afterwards when the defendant had testified as to his ownership of the shirt, and that the blood came from the deceased, the witness was permitted to testify, and the shirt was introduced in evidence. The court's remarks cast no reflection upon defendant's testimony; it was merely an illustration used to demonstrate the incompetence of the testimony at that stage of the proceedings.

Complaint is made by appellant because a pencil memorandum was made at the bottom of the state's first instruction, by Mr. Presley Groves, one of the attorneys prosecuting the case. The memorandum was made inadvertently on the sheet of paper containing the instruction, by Mr. Groves, before he noticed that the instruction was written thereon. Inasmuch as every solitary juror testified, on the motion for a new trial, that he had not noticed or read the memorandum, it is clear that no harm resulted. The point is without merit.

Objection is made by appellant to the argument of counsel for the state. But, it is submitted, it is not reversible error for an attorney to declare in his argument to the jury that the defendant is guilty. He has a right to express his opinion. 2 Ency. Pl. & Pr., 726. It is shown by appellant, in his motion for a new trial, that Mr. Groves, of counsel for the prosecution, stated to the jury in his argument that the appellant had not lived with his wife for two and a half years. But there can be no legal contention that this constitutes reversible error, for the record shows that this statement of Mr. Groves' was the truth. Besides, the objection of counsel for appellant to this statement seems to have been sustained by the court.

As regards the strong language used by associate counsel for the state in his argument, it is submitted that this did not constitute reversible error. "Just and fierce invective when based

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upon the facts in evidence, and all legitimate inferences therefrom, will not be discountenanced by the courts." 2 Ency. Pl. & Pr., 747.

WHITFIELD, C. J., delivered the opinion of the court.

We examined this case very carefully once before, and affirmed the judgment without writing. Upon application of one of the learned counsel for appellant the judgment was vacated and time given said counsel to file a written brief. We have read the brief carefully, and again gone through the record in the light of the argument made in that brief, and we remain of the opinion that there is no reversible error in the record. Certain objections to the action of the circuit judge, and also of prosecuting counsel, in the course of the trial, are so earnestly pressed upon us that we avail ourselves of this opportunity of making some observations in respect to assignments of this kind which seem imperatively called for, not because of the assignments of that character in this record only, but because of the astonishingly frequent recurrence of similar assignments of error in a majority, I think we may safely say, of felony cases appealed to this court.

To deal, first, with the facts in this record out of which these assignments grow. A witness, Isham Shearer, having been introduced and asked a few questions, the appellant asked to introduce to the jury the shirt Fed Gray (appellant) had on when Mr. Shearer arrested him and carried him to the jail, which shirt was supposed to be at the jail house when the witness was testifying. "Objection. The court remarked, 'How would the witness know it wasn't chicken blood on the shirt?' And this was said in the hearing of the jury, to which the defendant excepted then and there." We have given the exception in the very language of the record. This remark of the court was made before the shirt had been identified, and before it had been shown that there was any blood on the shirt, or where the blood came from. The court simply meant that the

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blood on the shirt should be accounted for and explained. The appellant later testified that it was his shirt, and that the blood came upon the shirt from the deceased, and the appellant was then permitted to testify about the matter, and the shirt was produced in evidence before the jury. Most manifestly there could not possibly have arisen from this anything to the prejudice of the appellant.

The motion for a new trial in its fourth ground set up the fact that Hon. Presley Groves, prosecuting attorney for the state, made certain memoranda on the first instruction for the state, and that the instruction went to the jury with the memoranda on it. This assignment of error is pressed here, although each juror was sworn, and without exception testified, each for himself, that he had not read the memoranda, and did not know anything about it. Does it need any argument to show that the jury could not have been mislead by that of the existence of which, even, they had no knowledge?

Many of the grounds in the motion for a new trial assail the argument made by the same counsel for the state. For example, it is objected that he said, "He is as guilty as he can be"; "called him a bloody assassin"; "that he said that the appellant was an athlete, and sprang to his feet, and shot Newton Wallace in the back of the head while he was standing, and then shot Felix Jones straight through from the front while he was standing, the ball going through him"; that he said "that the defendant murdered Newton Wallace in cold blood, and that he called on the jury whether they will put a stop to these homicides, and that there had been three or four in his neighborhood within the last few months, committed by negroes; and "that the proof in the case in the justice's court showed that the defendant had not lived with his wife for two and a half years or more," etc. So far as the observation about his not having lived with his wife for two and a half years is concerned, the testimony in this record shows that that was true. It is also true that Jones was shot in the same diffi-

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culty. So far as the expression of opinion of the learned counsel that the defendant was guilty is concerned, he certainly had the right to state his opinion from the evidence. It is said in 2 Ency. of Pleading & Prac., p. 747, that "just and fierce invective, when based upon the facts in evidence and all legitimate inferences therefrom, is not discountenanced by the courts." Were Burke and Sheridan, in the impeachment of Warren Hastings, to weigh impassioned invective, warranted by the evidence, in the scales of quibbling nicety? Has any one who ever read Mr. Webster's prosecuting speech in the Knapp trial, or Mr. Prentiss' great speech in behalf of Judge Wilkinson, thought the splendid diction and the marvelous imaginery and the terrible invective not fully justified by the facts? One cannot help being reminded of William Wirt's opening remark in the prosecution of Aaron Burr to the effect that Burr seemed to think that he (Mr. Wirt) as prosecuting counsel should deal with him as if he were "a courtier in a drawing-room." Is it possible that any sound objection can be based on any of the language of the learned prosecuting counsel in this case? District attorneys and prosecuting counsel representing the state, so long as their addresses to the jury are based upon and justified by the evidence in the cause, are not to have an indignation justly aroused against horrible crime iced down to the freezing point by too frigid a care, lest they transgress in the use of heated language. Fancy and reason may well have their full and legitimate play, however splendid the flights of the one, and however terrible the logic of the other, if only that fancy and that reasoning exercise themselves within the scope warranted by the testimony in the case. There are cases which call for invective—fierce invective. There are cases in which all the capacity of a really great orator and great lawyer may be exerted to its fullest proper limit, and yet the defendant have no right to complain, because the facts in the case may show a crime so horrible as utterly to shock the consciences of all who may

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have heard the evidence. In such cases great latitude may well be allowed in the interest of justice, always seeing to it that what is said is warranted by the testimony in the case.

The frequency with which these assignments of error recur would seem to indicate that the learned counsel who represent defendant have forgotten that the twelve men who sit in the jury box represent the average intelligence and the average integrity of the counties which they respectively serve. Most surely, if the laws with regard to the selection of juries have been themselves honestly and intelligently followed, juries do always represent the average intelligence and the average integrity of their counties. They do not sit as dummies in the jury box. They are to be dealt with by the judge of the lower court and by this court as men who appreciate and understand the oaths which they took as jurymen, as men having and exercising average intelligence and average integrity, capable mentally of understanding the written instructions of the court and the argument of counsel, and capable morally of having the courage and firmness to draw their own conclusions for themselves from the law as written and from the testimony as delivered, without reference to improper appeals from counsel on either side. The administration of justice is a preeminently practical thing. Far too many reversals are occurring all over the land in criminal trials on technical grounds. Supreme courts should not sit in the trial of causes as if in "quest of error," but rather with the purpose of administering between the state and the defendant exact and impartial justice, affirming the results reached in the courts below where that result is plainly and manifestly right on the whole record, and not reversing cases and subjecting counties to the expense of repeated new trials, giving to defendants who ought to be punished all opportunities for continuance and the various other means of escaping justice. Reversals on any grounds that do not look at the case as a completed case on the whole record, that are not soundly taken and seasonably presented, should

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never be had. And if these remarks are applicable to the juries of the country as regards the observations of counsel in the course of their arguments, how much more true are the same principles applicable with respect to the action of the learned circuit judges of this state!

We have recently had quite a number of cases in which all sorts of exceptions have been taken to the action of learned circuit judges in this district and that. One would almost suppose, from the frivolous character of some of these exceptions (not meaning, however, to characterize the ones in this case as frivolous), that the circuit judge himself must sit in his seat as if in a straight-jacket, and square his every word and act in the course of a trial with infinite precision to the nicety of a hair, lest he should do something or say something which could be seized upon by a thoroughly guilty defendant as a last hope of reversal. The learned circuit judges of this state occupy positions of great dignity, great authority, and great power in the communities in which they preside. They are entitled to the respect and reverence of their brethren of the bar, and may justly look to them as officers of the court to aid and uphold them in the vigorous enforcement of the criminal laws of this state, to the end that we may have established in this commonwealth good order everywhere. True, they have bounds which they cannot pass in their conduct in the trial of causes; but equally true is it that no frivolous, captious, caviling objections should be indulged in by counsel for defendants—no seizing upon utterly immaterial things said or done by the learned circuit judge in the trial of causes, unless those things said or done present to the reasonable mind, honestly weighing the situation, good ground for exception. We are not to be understood as minimizing the rights of a defendant at the bar to avail himself of any substantial infringement of his rights by prosecuting counsel in their argument, or by circuit judges in any part of their dealing with the case; but we are to be understood as emphatically reprobat-

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ing the vicious tendency, manifest in so many cases recently brought to this court, to seize upon observations of counsel for the state that have utterly no influence upon the jury, and even upon the doings and sayings of the circuit judge which by no possibility could have in the slightest degree infringed the constitutional and statutory rights of a defendant. This we do censure, and this we do hope to see end at once. Most especially do we desire to say that these observations are not made with particular respect to the instant case. We have merely used the instant case as an occasion for making these observations applicable, not to it particularly, but to the class of cases and the class of objections of which it forms one instance. We may say of the present case that it is far less open to the criticisms which we have been making than very many other cases that we have recently disposed of, and we have forborne from time to time to make just this line of observation in the hope that this delirium of objections would abate. But we have been disappointed. On the contrary, they have increased, and the object of making these remarks now is, in so far as we can, to put a summary end to this trifling and captious caviling, wholly unwarranted by the various records which we have examined. Let it be remembered, once for all, that if this plan of objection was to prevail, the spectacle would actually be presented of this tribunal sitting here to try, not whether the defendant in a cause had been properly found guilty of the charge against him, but whether the district attorney or the circuit judge had been guilty of some supposed grievous offense. We try, not the circuit judge, and not the district attorney, but the defendant.

Let the judgment be affirmed.

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Statement of the case.

ISAAC WOODS v. STATE OF MISSISSIPPI.

[43 South., 433.]

1. CRIMINAL LAW AND PROCEDURE. *Homicide. Assault with intent to murder. Instructions. Deliberation. Use of weapon.*

In a prosecution for an assault with intent to murder, instructions authorizing a conviction as charged "even if the blow was struck with a single-barreled shotgun without malice" and announcing that "the law presumes malice from the unlawful and deliberate use of a deadly weapon," are erroneous as justifying an inference that the judge thought there was unlawful and deliberate use of the loaded gun as a deadly weapon, although it was not fired.

2. SAME. *Evidence. Character of injured party.*

The state cannot show the good character of the party assaulted in a prosecution for the assault where his character was not attacked.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge

Woods, the appellant, a negro, was indicted and tried for assault and battery with intent to kill and murder another negro, Dade Edwards; was convicted and sentenced to the penitentiary for one year, and appealed to the supreme court.

The indictment charged appellant with feloniously assaulting Edwards with a gun, striking and wounding him with it with intent to murder him. Pending a quarrel between the parties, Edwards was struck upon the head with a shotgun by appellant with such force as to knock him senseless and discharge and unbreech the gun. The testimony was conflicting as to which was the aggressor; according to some of it, the appellant was without excuse for the blow, but according to the testimony of himself and his wife, he acted in self-defense.

During the trial, before the state had closed its case, one Sample, a white man, was introduced as a witness by the state

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Brief for appellant.

and allowed to testify touching the good character of Edwards in the community, although no attack had been made upon it.

The first instruction for the state, referred to in the opinion, was as follows:

"(1) The court charges the jury for the state that if they believe from the evidence beyond a reasonable doubt that defendant, Isaac Woods, struck the witness, Dade Edwards, over the head with a gun which was a deadly weapon, intending to kill said Dade Edwards, and not in necessary self-defense, at a time when defendant was in no immediate danger of loss of his life, or of great bodily harm, real or apparent, at the hands of Edwards, then the jury will find the defendant guilty as charged."

A second instruction for the state charged the jury that the law presumes malice from the unlawful and deliberate use of a deadly weapon.

George H. Hill, for appellant.

The court below erred in granting the first instruction asked by the state. This instruction in effect charged the jury to find the appellant guilty as charged if the jury should believe beyond a reasonable doubt that appellant intended merely to kill the assaulted party. There is a great difference between an intent to kill and an intent to murder. To constitute guilt on appellant's part his acts must have been characterized by an intent to murder. *Thames* v. *State,* 82 Miss., 667, 35 South., 171. The granting of this instruction was accordingly reversible error.

The testimony was to the effect that the witness, Edwards, went to appellant's house, and there cursed and abused appellant; that when appellant remonstrated, Edwards dismounted from his wagon, and after tying his horses, advanced on appellant with a large knife. It is clearly evident that the appel-

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lant was acting in self-defense when he struck Edwards with the gun barrel.

Under the circumstances it was incumbent for the state to prove, not only that appellant struck with intent to kill Edwards, but with malice aforethought, and that the single-barrelled gun in appellant's hands was a deadly weapon; all of which the state failed to prove.

To sustain a conviction in a case of this kind, the circumstances must have been such that, if death had resulted, the homicide would have been murder. *Cunningham* v. *State.*, 87 Miss., 417; Clarke & Marshall on Crimes, 283.

William Williams, attorney-general, for appellee.

The first instruction for the state correctly announced the law. The facts in this case and the language of the first instruction are entirely different from those in the case of *Thames* v. *State,* 82 Miss., 667, 35 South., 171, as will readily be seen by a comparison of the instruction complained of and the instruction in the case cited. The phrase, "and not in necessary self-defense," is not used in the instruction condemned in the *Thames case, supra.*

CALHOON, J., delivered the opinion of the court.

On this indictment for and conviction of assault and battery with intent to kill and murder our minds do not repose securely in the belief that there was either a purpose to kill, or that there was malice in the assault, or that the blow was not in self-defense. From the lightness of the sentence we think the accomplished and able circuit judge was himself not thoroughly at ease on these questions on the evidence. In this sort of a case, we think it was improper to give the state's first instruction, that in effect authorizes conviction "as charged," even if the blow was struck with the single-barreled shotgun without malice; and in the very next charge is given the abstract legal proposition that "the law presumes malice from the

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unlawful and deliberate use of a deadly weapon." The jury might infer from the two that the learned judge thought there was the unlawful and deliberate use of that gun as a deadly weapon, loaded though it was, and not used to shoot, as it might have been.

It is clear that the party struck went to appellant's house and began the trouble. He was the only witness of the fact for the state, and is contradicted by appellant and his wife, and she says without contradiction, that she took the hatchet to the house of the party assaulted, with which hatchet both say he was about to strike appellant when the latter struck. Both swear that Dade Edwards first started towards accused with a large knife, which he put in his pocket, and then took the hatchet. Certainly the knife was in the pocket of his "jumper" coat, and it is not easy to see how they could have known it, unless they had seen it. The testimony of the assaulted man has marks of improbability. In any event, the case required particularity in charges, so as not to mislead.

It was highly improper for the state to show the good character of Dade Edwards, the party assaulted, when no attack was made on it.

Each case must be governed by its own facts, and they gauge the propriety of decisions. This is reversed and remanded.

Reversed and remanded.

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Statement of the case.

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ESTELLA WARD v. STATE OF MISSISSIPPI.

[43 South., 466.]

CRIMINAL LAW AND PROCEDURE. *Larceny. Affidavit. Separate articles. Different owners.*

An affidavit charging petit larceny is not vitiated by averring the articles of property stolen to belong to different owners; but on the trial in such case the state would be compelled to show a single asportation.

FROM the circuit court of Claiborne county.

HON. JOHN N. BUSH, Judge.

Madame Ward, appellant, having been convicted of petit larceny before a justice of the peace, appealed to the circuit court; and, upon her conviction there, she appealed to the supreme court.

The affidavit, as amended in the circuit court, on which appellant was convicted, charged that she "then and there did feloniously steal, take and carry away one shirt waist of the value of $2.50, the personal property of Mrs. Howard, and twelve yards of calico, of the value of $1, the property of Carrie Ryan." The amended affidavit was demurred to by appellant in the circuit court on the ground that it charged two separate offenses, but her demurrer was however overruled.

The testimony for the state showed that the articles mentioned were found hidden beneath appellant's bed. The only evidence of Carrie Ryan's ownership of the calico was, that Mrs. Howard had bought the same for her, and had placed the same in her bureau drawer whence the calico had been taken, evidently by appellant, before its discovery by Mrs. Howard to Carrie. The evidence as to Mrs. Howard's ownership of the shirt waist rested solely on the testimony of her husband, who testified that his wife told him, in the absence of

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appellant, that she missed the shirt waist from her bureau shortly before it was found hidden under appellant's bed.

C. A. French, for appellant.

The amended affidavit set out two separate and distinct larcenies in one count and in one sentence. This was not good pleading. The appellant could not tell upon which charge she was to be tried. *Hill* v. *State,* 72 Miss., 527, 17 South., 375; *Roberts* v. *State,* 55 Miss., 421; *Harris* v. *State,* 71 Miss., 598, 14 South., 266; 22 Cyc., 376.

The affidavit charged that the calico belonged to Carrie Ryan. The testimony of Carrie Ryan however shows that Mrs. Howard had bought the calico for Carrie Ryan, but had not given it to her, still retaining possession of it when it was taken. It was therefore, in law, the property of Mrs. Howard. A person derives no title to property given him until there has been a delivery of the same to him by the donor.

Moreover, the evidence to uphold Mrs. Howard's ownership of the shirt waist, resting solely upon her husband's testimony and based on what Mrs. Howard had, in the absence of appellant, told him, was purely hearsay.

R. V. Fletcher, assistant attorney-general, for appellee.

The only important question of law in this case is, whether the affidavit, as amended, was fatally defective in charging more than one crime in the same count. Counsel for appellant contends that since there were two articles stolen, each belonging to different persons, two crimes are charged in the same affidavit. Now, it is the state's contention that if a person steals at the same time and by the same act two articles, both together forming one package, or even in different packages, only one larceny has been committed. It makes no difference that there were two articles or more stolen, nor does it matter as to the ownership of the various articles, if only one criminal act was necessary in order to complete the larceny.

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Opinion of the court.

That the stealing of several articles of personal property at the same time and place constitutes only one offense, and should be so charged, even though the different articles may belong to different owners, has been held to be the law in Missouri, Nevada, New Hampshire, Oregon, Pennsylvania, Tennessee, Georgia, Kentucky, Maryland, Ohio, Vermont, Washington, Massachusetts, Illinois, Virginia, Texas and District of Columbia; and also so held under statutes of the United States. See the overwhelming collection of cases in 27 Am. Digest, sec. 393, p. 695.

These authorities announce well settled rules which can be found in any standard text-book upon the subject. This doctrine is upheld by the language of this court in *Scarver* v. *State,* 53 Miss., 407.

Whether, on the facts, the articles charged to be the property of Carrie Ryan and of Mrs. Howard, the owners thereof alleged in the affidavit, are so shown, is respectfully referred to the court.

CALHOON, J., delivered the opinion of the court.

The affidavit is not vitiated by charging that different articles stolen were the property of different persons, specifying the articles and owners. The only result would be, on the trial in this case, to compel the state to show a single asportation. However, it is plain that the article charged to be the property of Carrie Ryan was not hers. It was only promised to be given her, and never delivered. She could not have maintained replevin for it against Mrs. Howard. It is also plain that the evidence of ownership of any of the property by Mrs. Howard is mere hearsay, and cannot sustain conviction.

Reversed and remanded.

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Statement of the case.

STATE OF MISSISSIPPI v. WILLIAM STARLING.

[42 South., 203.]

CRIMINAL LAW AND PROCEDURE. *Forgery. Code* 1892, § 1108. *Indictment.*

An indictment, under Code 1892, § 1108, providing that the making with intent to defraud, of a false entry in any book of accounts kept by a moneyed corporation to be, or intended to be, delivered to a person dealing with the corporation, by which any pecuniary obligation is affected, shall be guilty of forgery, is insufficient if it fail to show how a pecuniary obligation was to be affected.

FROM the circuit court of Washington county.

HON. A. McC. KIMBROUGH, Judge.

Starling, the appellee, was indicted for forgery; his demurrer to the indictment was sustained by the trial court and the state appealed to the supreme court.

The case, *Starling* v. *State,* next following in this volume, grew out of the same transactions.

Appellee, Starling, was indicted under Code 1892, § 1108, providing that "every person who, with intent to defraud, shall make any false entry, or shall falsely alter any entry made in any book of accounts kept by any moneyed corporation within this state, or in any book of accounts kept by any corporation or its officers, and to be delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary obligation, claim, or credit, shall be in any manner affected, shall be guilty of forgery." The indictment, omitting formal parts, reads as follows; the clauses inclosed in brackets in the first count being stricken out by amendment with leave of the court:

Count 1: ". . .. Did then and there forge and counterfeit the books of accounts kept then and there by the Mer-

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Statement of the case.

chants' & Planters' Bank, a moneyed corporation duly incorporated under the laws of the state of Mississippi, particularly the 'Daily Statement Book,' marked 'I' on page 297 thereof, of said books so kept by said corporation, with the intent then and there and thereby wilfully, unlawfully, and feloniously to defraud the said corporation, the Merchants' & Planters' Bank aforesaid, by then and there falsely entering therein [a debt balance to the Guaranty Trust Company of New York, called on said book its 'New York Account,' of $1,304.12, which entry should have been a credit balance to said account of $3,695.88, and by then and there falsely entering] a debit balance against the Hibernia Banking & Trust Company, New Orleans, La., called on said books its 'New Orleans Account,' a debit balance of $5,073.69, which entry should have been a debit balance of $20,073.69 [and by then and there falsely entering against the National Bank of Commerce of St. Louis a debit balance of $1,475.71, which entry should have been a credit balance to said account of $13,524.29], to the great damage of said corporation, and whereby the pecuniary obligations of said the Merchants' & Planters' Bank were affected as aforesaid," etc.

Count 2: ". . . By entering therein and thereon various and sundry debit and credit balances to the various and sundry accounts kept in said books of divers and various sums of money, then and there and thereby affecting and increasing and diminishing the pecuniary obligations of said corporation, the Merchants' & Planters' Bank aforesaid, in divers and various sums of money, which said debit and credit balances and the amounts thereof, respectively, and which various and sundry accounts and the entry thereof in said books, and the divers and various sums of money in said entries, and the amounts by which said accounts were increased and diminished, being now to the grand jurors unknown, to the great damage of said corporation," etc.

Defendant demurred to the indictment, and the court be-

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Opinion of the court.

low sustained the demurrer, and the state appealed to the supreme court. The appellee filed a motion to dismiss the appeal, setting up the fact that since it had been granted, the grand jury had returned a new indictment covering the offense with which he was charged in the indictment herein, which new indictment attempted to remedy the defects in the present indictment as amended. The state contended that, since the correctness of the action of the court below touching the validity of an indictment is called in question, it is entitled to a ruling on the correctness and validity of the indictment. The supreme court considered the case on the motion and on the merits together.

R. N. Miller, and *R. V. Fletcher,* assistant attorney-general, for appellant.

J. H. Wynn, and *Shields & Boddie,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The motion in this case is overruled. On the merits it is enough to say that the action of the court below was correct, for the reason that the indictment did not show how any pecuniary obligation was to be affected.

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Syllabus.

WILLIAM STARLING v. STATE OF MISSISSIPPI.

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[43 South., 952.]

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Conclusion. Constitutional law. Constitution* 1890, *sec.* 169.

An indictment concluding, as required by Constitution 1890, sec. 169, "against the peace and dignity of the state," is properly concluded, although it contains two or more counts and the quoted words do not follow each count.

2. SAME. *Last count bad.*

In such case if the last count of the indictment be held bad on demurrer the conclusion remains and is applicable to each preceding count.

3. SAME. *Bill of particulars. Right to demand.*

A party will not be obliged to furnish facts already known to his adversary, nor will a bill of particulars be ordered when the means of obtaining the facts are equally accessible to both parties.

4. SAME. *Election of offenses by state. Code* 1892, § 1058.

Code 1892, § 1058, making an officer of an incorporated company who shall "embezzle or fraudulently secrete, conceal or convert to his own use, or make way with or secrete with intent to embezzle or convert to his own use," any property of the company which shall have been intrusted to his possession by virtue of his office, guilty of embezzlement, states the different forms of embezzlement; and the state, on a trial of an indictment under the statute, may prove as many of the different acts of embezzlement as it is able to do, and all of the proof may be submitted to the jury, without requiring the state to elect any single act on which it will rely for a conviction.

5. SAME. *Appeal. Harmless error.*

Where, on a trial for embezzlement in violation of Code 1892, § 1058, making an officer of an incorporated company, who shall embezzle or fraudulently secrete, conceal, or convert to his own use the goods of the company, guilty of embezzlement, it appeared clearly that accused was guilty of every act of embezzlement shown by the testimony, the error, if any, in refusing to require the state to elect on which act it would rely for a conviction, is not reversible.

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Brief for appellant.

FROM the circuit court of Washington county.

HON. SIDNEY M. SMITH, Judge.

Starling, the appellant, was indicted, tried and convicted of embezzlement and appealed to the supreme court.

An indictment for forgery against the defendant growing out of the same transactions was adjudged bad and the state appealed to the supreme court. That case is reported, see case, *State* v. *Starling,* next preceding this one in this volume.

The facts touching the points in controversy sufficiently appear from the opinion of the court.

R. B. Campbell, J. H. Wynn, and *Shields & Boddie,* for appellant.

1. Failure of the indictment to conclude with the words "against the peace and dignity of the state" as required by the constitution was fatal. Constitution 1890, sec. 169; *Love* v. *State,* 8 South., 465; *State* v. *Morgan,* 79 Miss., 65, 31 South., 338; *Miller* v. *State,* 81 Miss., 162, 32 South., 951; 22 Cyc., 234; 10 Ency. Pl. & Pr., 441.

2. Each count in the indictment should have so concluded. 10 Ency. Pl. & Pr., 444; 22 Cyc., 249; *Williams* v. *State,* 1 S. W., 149, and 70 S. W., 933.

3. Failure to so conclude was not amendable without the consent of the grand jury. Constitution 1890, sec. 27; *Cox* v. *State,* 8 Tex. Ct. App., 254; *Ex parte Bain,* 121 U. S., 1; in 22 Cyc., 251, the cases of *Cain* v. *State,* 4 Blackf.; *Com.* v. *Hoxey,* 16 Mass., *State* v. *Minford,* 64 N. J. L. and *State* v. *Amidon,* 58 Vt., are cited as holding that failure to so conclude in an indictment is amendable; but the first mentioned of these cases allowed the amendment with the consent of the grand jury, which, according to the practice of that state, gave its consent upon returning indictments, that any formal amendment therein might be made, and that case is obnoxious to appellant's view, only so far as it holds that such a defect is formal, and not of substance. *Com.* v. *State,* 16 Mass., does

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Brief for appellant.

not touch upon the question here involved, and in *State* v. *Minford,* 64 N. J. L., deciding such a defect to be one of form, and amendable under the statute of that state, it also appears that the grand jury had consented to the amendment. In *Frisbie* v. *United States,* 157 U. S., 160, the failure of the indictment to so conclude was held to be a formal defect, that was cured by an act of congress providing that such defects should not render an indictment insufficient, nor affect the trial thereunder; but that case did not involve any constitutional question, as the constitution of the United States does not require an indictment to conclude in any particular way.

The only case that holds the question under discussion adverse to appellant is the case of *State* v. *Amidon,* 58 Vt., and as opposed to that case is the case of *Cox* v. *State,* 8 Tex. Court of Appeals, *ubi supra,* wherein that court says that the conclusion of an indictment, being prescribed by the organic law, is a matter of substance as well as of form.

As the failure of the indictment to conclude as required by the constitution may be raised at any stage of the proceedings, even for the first time, on appeal, and, whenever raised, will be fatal to it, it must be of substance. How can it be otherwise since it is required by the organic law of the state, and has been in every constitution that our state has had?

It is clear that § 1351, Code 1892, does not cure the defect, and, if not a formal defect within that section, how can it be said to be covered by Code 1892, § 1355? If not a formal defect, within the meaning of the first of these sections, it should not be considered such within the meaning of the other section and, if not covered by these sections, there is no other section of the code, that authorizes an amendment of an indictment as to the conclusion required by the constitution.

3. If the indictment was amendable in that regard it should have been actually amended, and spreading the amendment in the minutes of the court was not sufficient. *State* v. *Miller,* 53 Miss.

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Brief for appellant.

Code 1892, § 1436, does not relate to such an amendment. That section of the code refers alone, as its language shows, only to the section which immediately precedes it, covering amendment necessitated by a variance between the indictment and proof, and was passed to meet the case of *State* v. *Miller,* 53 Miss., as to that character of amendment. Without legislation authorizing the amendment, even if such legislation be admissible, which appellant denies, the amendment could not be effected, without the consent of the grand jury. If the court orders such an amendment, and fails to have the indictment so changed as to conclude as required by the constitution, the constitution is still violated, because it requires that the indictment shall so conclude. The constitution does not say that the minutes of the court shall so conclude.

4. The indictment is too uncertain, since it charges that the embezzlement was of "a balance of account."

True, it conforms, in that particular, with Code 1892, § 1364, but that section in that particular is unconstitutional. Legislation authorizing such general description of property as mentioned in the first clause of that section has been sustained but that is as far as the courts have gone. No reported case has been found that upholds such general description as is authorized by the last clause of that section, describing the property embezzled as "a balance of account." If that legislation be upheld as constitutional, and the indictment be sustained in that particular, then unquestionably the appellant's motion for a bill of particulars should have been sustained; and, since it was not, the appellant was denied his constitutional right to demand the nature and cause of the accusation against him. *State* v. *Hanaw,* 65 N. W., 231; *Thalheim* v. *State,* 38 Fla., 169; *Rosen* v. *United States,* 161 U. S., 29; *State* v. *Hodson,* 66 Vt. 134; *People* v. *McKinney,* 10 Mich., 54; 1 Wharton's Crim. Law, sec. 1048. Besides the indictment charges that appellant had in his care or possession, as agent of the bank "a balance of account" of the value of $72,000, which "sum of

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Brief for appellee.

money" or "balance of account" he did embezzle. The thing embezzled was broader than the thing alleged to have been in his care and possession. Which did he embezzle, money or balance of account?

5. The first and sixth instructions given for the state were manifestly wrong and were not cured by any instruction for appellant.

The indictment charges appellant with embezzlement, pure and simple. Fraudulent concealment or secreting of property by an agent is a distinct offense under our statute. Fraudulent conversion by an agent to his own use is likewise a separate and distinct offense; and so is embezzlement which is the fraudulent conversion by the agent to his own use of property in violation of his trust. If fraudulent concealment (without conversion) be a distinct offense under the statute then in these instructions for the state the court authorizes the jury to convict appellant of an offense with which he was not charged. The court virtually told the jury that although the appellant was charged simply with embezzlement, and although under the statute fraudulent concealment of property in violation of his trust was a distinct crime, still if they believe from the evidence that he either fraudulently concealed, or secreted, or converted to his own use the property they should convict him.

George Butler, assistant attorney-general, for appellee.

While it is true that by sec. 169 of our constitution all indictments are required to be concluded "against the peace and dignity of the state" and our court in the cases of *Love* v. *State,* 8 South., 465; *State* v. *Morgan,* 79 Miss., 659, 31 South., 338; *Miller* v. *State,* 81 Miss., 162, 32 South., 951, has construed this provision to extend to and include prosecutions based on affidavits or informations, thereby making such informations of equal dignity with the indictment, and that it is a well established and recognized rule that each count of an indictment

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Brief for appellee.

must be complete within itself, still this rule refers to matters of substance; that is, the findings of the grand jury which make up and constitute the offense charged, and not the mere legal conclusions deducible therefrom, and formal requisites which may be required by an ancient rule of pleadings or a constitutional provision. It is true that it is stated in 22 Cyc., 249, that by the weight of authority where there are several counts in an indictment, each should conclude with the formal conclusion "against the peace, etc.," yet, upon investigation, it will be seen that the text is neither supported by the larger number of decisions nor the better reasoned cases.

The supreme court of Tennessee in the case of *Rice* v. *State,* 3 Heisk., 215, holds that it is imperative that all indictments conclude "against the peace and dignity of the state" but that it is sufficient if the whole indictment has this formal conclusion. It is said in that case: "It is held that each count in an indictment must be a complete indictment in itself. This, we think, refers to the description of the offense and not to the formal conclusion." The constitution of Alabama requires that all indictments shall conclude "against the peace and dignity of the State of Alabama" and that court held in the case of *McGuire* v. *State,* 37 Ala., 161, that it was not necessary that each count should so conclude. In Texas, which has a similar constitutional provision to that of Mississippi, it has been held that it is not necessary that each count contained in an indictment should conclude "against the peace and dignity of the state" but only that the indictment or information as a whole should so conclude. *Alexander* v. *State,* 27 Tex. Ct. App., 533; *West* v. *State,* 27 Tex. Ct. App., 472; *McFarland* v. *State,* 8 Tex. Ct. App., 472. And this, notwithstanding that court has decided that an indictment which does not conform strictly to the constitutional provision is invalid. *Cox* v. *State,* 8 Tex. Ct. App., 254, 34 Am. Rep., 746; *Haun* v. *State,* 13 Tex. Ct. App., 383, 34 Am. Rep., 706; *State* v. *Thompson,* 51 La. Ann., 1089; *Scott* v. *State,* 48 La. Ann.,

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Brief for appellee.

293; *State* v. *Travis,* 39 La. Ann., 356; *Olendorf* v. *State,* 64 Ohio St. Rep., 118; *Nichols* v. *State,* 35 Wis., 308; *State* v. *Beatty,* 61 N. C., 52; *Bollin* v. *State,* 51 Neb., 581; *State* v. *Amidon,* 58 Vt., 524; *State* v. *Mitford,* 64 N. J. L., 520.

R. N. and *H. B. Miller,* on same side.

The prosecution could not know and could not inquire into the details of the evidence before the grand jury. It is sufficient to say of the indictment that the statute, § 1436, Code of 1906 (§ 1364, Code of 1892), authorized the funds embezzled by a treasurer, cashier or other fiduciary to be described as a "balance of account" and "of a certain value." The defendant cannot show that the offense for which he is on trial was not that contemplated by the grand jury. 22 Cyc., 205 and 207, note 24.

The instructions for the state are practically without criticism in the brief of counsel for appellant, and are really correct and impossible of legitimate criticism. All the charges asked by the appellant which should have been given were given, in effect.

As to the suggestion that the word "fraudulently" being left out of the indictment and the claim that it ought to be in, we say that counsel for appellant is mistaken and particularly in quoting, *State* v. *Broughton,* 71 Miss., 90, 13 South., 885. Judge WOODS in delivering the opinion of the court says, that the particulars of the proof which counsel in this case insist ought to have been plead in the indictment, and which were plead in the indictment in the case, 71 Miss., *supra,* were wholly unnecessary. In that case, Judge WOODS simply said what he thought would have been sufficient, and held the indictment good, and the matter of the court's suggestion in that case is pure *obiter dicta,* as to the intent to defraud.

The true rule is stated in 2 Bishop's Criminal Procedure, sec. 322, as follows:

"It is believed that the single statuory word embezzle, 'did

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Brief for appellee.

embezzle,' sufficiently indicates the crimial act; just as 'did burn' in arson; 'did make an assault' in assault; 'did solicit' in attempt, *et cetera, et cetera.*"

In sec. 323 he says, "If the word embezzle is qualified in the statute by "fraudulently" or any other, the qualifying word should, of course, be also in the indictment."

By Code 1892, § 1058, it is provided: "If any director, agent, etc., shall embezzle or fraudulently secrete, etc."

It will thus be seen that the word embezzled here is not qualified by the word "fraudulently" or any other word, and therefore it was sufficient to say "said William Starling unlawfully, wilfully and feloniously did then and there convert to his own use and embezzle." Embezzlement, the court will remember, is not a crime at common law, but is a purely statutory crime and therefore, in considering an indictment for this crime we must look to the particular statute. The statute as above stated puts embezzle or fraudulently secrete in the disjunctive, and it would have been sufficient to have said "then and there embezzle." 3 Chit. Cr. Law, 963; *Rex* v. *Crighton,* Russ & Ry., 62. In 7 Ency. Pl. & Pr., 415, it is said: "The offense being statutory, the sufficiency of the indictment is to be tested, not by the rules of the common law but by the requirements of the particular statute, etc." And on page 416 it is said that in an indictment for embezzlement matters of evidence should not pleaded, and on the same page, the rule is stated:

"As in prosecutions for other statutory offenses the overwhelming weight of authority is that it is sufficient to charge the crime in the language of the statute." See note 3.

The purpose of the indictment here was not to charge that Starling "fraudulently secreted" anything, but that he embezzled the funds of the bank and the statute we repeat makes either, in the alternative, a crime, and is perfectly good without the word "fraudulently" because no such qualifying word is attached to the word embezzle in the statute.

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Brief for appellee.

As to the assignment of error that defendant was not furnished a bill of particulars—aside from *Westbrooks* v. *State*, 76 Miss., 710, 25 South., 491, in which this court said "the practice of giving a bill of particulars has been unknown among us" in this particular case it was proper to deny one, for as said in 3 Ency. Plead. & Prac., 529:

"A party will not be obliged to furnish facts already known to his adversary. Nor will a bill of particulars be ordered when the means of ascertaining the facts are equally accessible to both parties." See notes 1 and 2, in which authorities are cited, too numerous to mention, from nearly every state in the Union.

On page 530 the rule is stated as follows:

"A bill of particulars will not be required when it is not in the power of the party to furnish one or when, from the nature of the case, the knowledge sought cannot be expected to be given with certainty." See note 3.

In this case Starling and his lawyers knew better than the attorneys for the state that the books kept by Starling himself would be relied on as furnishing the evidence against him; they covered many thousands of entries or failures of entry and they were bound to know that the state would rely upon the various checks drawn and paid by Starling on the bank and out of the funds of the bank, which were not entered on the books. The record further shows that all these books and checks and vouchers of every kind used as evidence by the state were in the hands of the receiver appointed by the chancery court and not in the possession of the state, and equally accessible to the defendant as they were to the state's attorneys, and he had no earthly right to call upon us for any bill of particulars. The record shows that he knew he was an embezzler; he confessed as much to the president of the bank and there was no earthly reason why the state should point out to him the record he, himself, had made as bookkeeper of the bank.

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Brief for appellee.

If, for the sake of argument, we concede that it was error not to furnish him a bill of particulars, but when we stand at the end of a completed trial and as was said by this court in a memorable case: "Where the sweep of an irresistible tide of evidence would despite an immaterial error of the court . . . bear an enlightened mind and conscience to a fixed conclusion of guilty, the appellate court may not properly reverse."

The only assignment of error which is worth debate; the only point in the case that I apprehend will seriously challenge the attention of the court is the right and power of the court below to permit the indictment to be amended, if it was necessary, by adding after the first count the constitutional conclusion, "Against the Peace and Dignity of the State."

The authorities are divided on the proposition that each count in the indictment must conclude "Against the Peace and Dignity of the State," 22 Cyc., 249, counts the states on either side of this question about evenly in notes 31 and 32. It counts Mississippi with those requiring each count so to conclude in *Johnson* v. *State,* Walker, 392, but an examination of the case will show that there was but one count in the indictment, and it is curious to note, as a matter of ancient history, that in this early case this court held by implication the failure to conclude "Against the Peace and Dignity of the State" although our ancient constitution then required it, was a matter of mere form and not a matter of substance because the indictment in that case failed so to conclude, and the court held that the counsel for the appellant had abandoned that assignment of error.

We say therefore here, that in Mississippi it is not necessary that each count in the indictment should so conclude, but like the following authority it is sufficient for the whole indictment so to conclude. *McGuire* v. *State,* 37 Ala., 161; *State* v. *Thompson,* 51 La. Ann., 1089; *State* v. *Scott,* 48 La. Ann., 293; *State* v. *Travis,* 39 La. Ann., 356; *Olendorf* v. *State,* 61

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Ohio St., 118; *Commonwealth* v. *Paxton,* 14 Phila., 665; *Rice* v. *State,* 3 Heisk. (Tenn.), 215; *Stebbins v. State,* 21 Tex. Cr., 294; *Nichols* v. *State,* 35 Wis., 308; 27 Cent. Dig. Title Indictment & Information, sec. 124.

Argued orally by *J. H. Wynn,* for appellant, and by *R. N. Miller,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The indictment in this case contains two counts, and was drawn under § 1058 of the Code of 1892. That section provides that: "If any director, agent, clerk, servant, or officer of any incorporated company, ... shall embezzle or fraudulently secrete, conceal or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods," etc., "he shall be guilty of embezzlement and shall be punished," etc. The first count of the indictment did not add at the conclusion thereof "against the peace and dignity of the state of Mississippi." Those words were added after the second count. The appellant filed a demurrer to the first count in the indictment, and also a demurrer to the second count in the indictment. The demurrer to the first count was because, as alleged, it did not conclude with the words "against the peace and dignity of the state of Mississippi," as required by section 169 of the constitution. The second count was demurred to on certain grounds not necessary to state. The demurrer to the first count was also expanded later, so as to express five other grounds, also not necessary, in the view we take of this case, to be stated. The district attorney obtained leave to amend the first count by adding at its conclusion the words "against the peace and dignity of the state of Mississippi." The appellant excepted. The court sustained the demurrer to the second count, and overruled the demurrer to the first count as amended. The appellant excepted.

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Opinion of the court.

The contention most seriously pressed by the learned counsel for appellant is that the words "against the peace and dignity of the state of Mississippi" should have been added after the first count, and that the failure to add them made that count void, and the whole indictment void, and that, since the constitution requires the indictment to conclude with these words, they are necessarily a matter of substance, and not of form, and, being so, the court erred in allowing the first count to be amended by adding them. We are clearly of the opinion that the words "against the peace and dignity of the state of Mississippi" are only required to appear, in the language of the constitution, at the conclusion of the indictment. It is not necessary that they should be repeated after each count. The language of the constitution is: "All indictments shall conclude against the peace and dignity of the state." No single count in an indictment containing more than one is the indictment. The indictment is the thing which contains all the counts. There may be many counts, but there can be but one indictment. The bill of indictment, in the language of the law, is a unit, is one complete thing, and it is this bill of indictment to which the constitution has reference in section 169. The bill of indictment in this case did conclude, as the constitution requires, with the words "against the peace and dignity of the state." Those words, whenever they appear at the conclusion of an indictment, necessarily apply to every count in the indictment going before its conclusion, and it would be the merest tautology to repeat them at the end of each count. All that is meant, when it is said that each count must be complete in itself, is that each count must completely and accurately define the offense, giving all its essential constituent elements, embraced in that count; and, whenever a count in an indictment does that, it has perfectly fulfilled its office. The words in this indictment, "against the peace and dignity of the state," do not belong to either count, technically

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considered. They belong to the conclusion of the whole indictment, as the constitution requires.

Section 169 also expressly provides that "all prosecutions shall be carried on in the name and by authority of the state of Mississippi." The first count of this indictment charges that the prosecution is "in the name and by the authority of the state of Mississippi," but the second count does not repeat that language. Is it possible that a demurrer to the second count of the indictment would be sustained on the ground simply that those words, "that the grand jurors presented in the name and by the authority of the state of Mississippi," were omitted; the idea being that, unless those words were repeated in the second count, the prosecution was not, so far as the second count was concerned, in the name and by the authority of the state? So to hold would be absurd. The words "in the name and by the authority of the state of Mississippi" are part of the preface of the indictment, just as the words "against the peace and dignity of the state" are part of the conclusion of the indictment, and all that is in the prefatory, as well as all that is in the concluding, part, applies equally to every count in the indictment, without being repeated uselessly therein. Put it in another view: Suppose the demurrer to the first count of this indictment had been sustained, and the first count stricken out. The learned counsel for appellant, to be consistent, would necessarily insist that the second count, also, should be stricken out, because it did not contain these words "in the name and by the authority of the state"; those words having fallen with the first count, in which, according to counsel's theory, they were contained, which count had been stricken out. These two views serve to put in clear light the utter illogicalness of the view that the words "in the name and by the authority of the state of Mississippi," in the preface of an indictment, or the words "against the peace and dignity of the state," in the conclusion of an indictment, are to be uselessly and tautologically repeated in every count in the indict-

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ment, no matter how many counts. The counts in the indictment are intended to charge, with accuracy and completeness, the specific offense the state seeks to fasten on the defendant—to define the constituent essential elements of such offense—and no more. The prefatory part of an indictment, showing that the process is "in the name of the state of Mississippi" and the presentment "in the name and by the authority of the state of Mississippi," and the conclusion of an indictment, charging all that has been charged to have been done, in one or many counts, is "against the peace and dignity of the state of Mississippi," ought not to be properly embraced in any count in any indictment, since both the preface and the conclusion of every bill of indictment apply to every count therein.

This is the view clearly sustained by the best-reasoned cases. We refer to a few only. The supreme court of Tennessee, in the case of *Rice* v. *State,* 3 Heisk., 215, held that it was imperative that all indictments should conclude "against the peace and dignity of the state," but said it was sufficient if the whole indictment had that formal conclusion. It further said: "It is held that each count in an indictment must be a complete indictment in itself. This, we think, refers to the description of the offense, and not to the formal conclusion." The constitution of Alabama has the same requirements our does; but that court held, in *McGuire* v. *State,* 37 Ala., 161, that it was not necessary to show that each count should conclude with these words. Whilst the Texas supreme court did hold that an indictment which did not conform strictly to this constitutional provision was invalid (*Cox* v. *State,* 8 Tex. App., 254, 34 Am. Rep., 746), that court nevertheless held that it was sufficient if the indictment as a whole concluded with these words, and that it was not necessary that each count should so conclude. *Alexander* v. *State,* 27 Tex. App., 533, 11 S. W., 628; *McFarland* v. *State,* 31 Tex. App., 472. Article 90 of the constitution of 1898 of Louisiana contains this same provision; but that court held, in *State* v. *Thompson,* 51 La. Ann.,

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1089, 25 South., 954, that "the concluding words of an information necessarily refer to the several counts therein, and their repetition after each count would be useless tautology." As is well said in one of the Ohio cases cited in the course of argument by the attorney-general, if the framers of the constitution intended that each count should so conclude, it was the simplest thing in the world to say so, and the court said: "The requirement is that an indictment shall conclude with the words 'against the peace and dignity of the state of Ohio,' not that each count shall so conclude. The words 'against the peace and dignity of the state of Ohio,' at the conclusion of an indictment, mean that the whole indictment and each count therein is against the peace and dignity of the state," etc. *Olendorf* v. *State,* 64 Ohio St., 118, 59 N. E., 892. In the case of *Commonwealth* v. *Paxton,* 14 Phila. (Pa.), 665, referring to a similar constitutional provision, it was said: "It has been held that each count in an indictment must allege a distinct substantive offense; but this, we think, refers to the description of the offense, and not to the formal commencement and conclusion. The bill of indictment, although containing several counts, is one. The first count in the indictment under consideration concludes 'against the peace, etc.' The second count has the full conclusion. We hold this to be sufficient, and that the words 'against the peace and dignity of the commonwealth of Pennsylvania,' in the last count, relate as well to the preceding count." In *Nichols* v. *State,* 35 Wis., 308, where the same constitutional provision is enforced, the court said: "This form is mere rhetorical flourish, adding nothing to the substance of the indictment, and it is difficult to observe why the mandate for its use was inserted in the constitution; yet it is there and must be obeyed. Of course, the accused cannot possibly be prejudiced or in any manner misled by the omission of this formula from the indictment, and the usage of it is held necessary for the sole reason that the constitution ordains that it shall be used, and if the indict-

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ment as a whole concludes in the prescribed form, no matter how many counts it may contain, that is all that is required."

Finally, a case perfectly on all fours with this case and conclusive here is the case of *State* v. *Amidon,* 58 Vt., 524, 2 Atl., 154. The constitution there had the same requirements, and exactly what occurred here occurred there. There were two counts in the indictment, and a demurrer to each. The demurrer to the second count was sustained, and to the first count overruled. After the last count were the words "against the peace and dignity of the state." Those words were not added to the first count. The court said: "Suppose this contention is conceded. Does not this indictment close with the very words prescribed? The indictment does not close at the end of the first count thereof. That count ends in the middle of the indictment. The two counts together form the indictment. As the indictment closes with the very words prescribed by the constitution, the contention upon that basis is without support or foundation. In indictments, matters of form may be amended; matters of substance may not be. It may be difficult to express in exact language that will be applicable to every case what constitutes substances of an indictment, and what is merely formal. In general, I think it may be laid down that the statement of every fact necessary to be proven to make the act complained of a crime is a matter of substance in an indictment, and that all beyond the order of arrangement of the precise words, unless particular words alone will convey the proper meaning, is formal." And the court concluded by holding that the court below properly allowed the first count of the indictment to be amended by adding those words. And the United States supreme court, in the case of *Frisbie* v. *United States,* 157 U. S., 160, 15 Sup. Ct., 586, 39 L. Ed., 657, said: "So far as respects the objection that the count does not conclude that the offense charged was contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States, it is

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sufficient to say that such allegation, which is one of a mere conclusion of law, is not of the substance of the charge, and the omission is but a mere matter of form, which does not tend to the prejudice of the defendant, and is therefore, within the rule of section 1025 of the Revised Statutes [U. S. Comp. St., 1901, p. 720], to be disregarded."

Our view is that these words "against the peace and dignity of the state" are in the conclusion of the indictment, that the indictment does in the very language of the constitution conclude with those words, and that that conclusion applies to every count preceding the conclusion, and hence that the first count in this indictment needed no amendment of this sort. The sustaining of the demurrer to the second count of the indictment took that count out of the indictment, but did not take those words constituting the conclusion of the indictment, "against the peace and dignity of the state," out of the indictment. They remained, and apply to this first count in the indictment, which, we think, was perfect against that assault. No amendment being necessary, it is out of place to observe upon the propriety of the amendment. It may be proper to remark that whether those words "against the peace and dignity of the state" constitute matter of form or matter of substance, as those terms are used in the technical law of criminal pleading, depends solely on the idea inherently set forth by those words, or, to put it differently, on the essential nature of the thing embraced by those words, and not upon the mere fact that the constitution required them to be used. If those words are of the substance of an indictment, they are so for the same reason that any other words are of the substance of an indictment, because they are essential to the definition of the offense intended to be charged—not because they are required by the constitution to be used in the conclusion of the indictment. For example, if the constitution had done so foolish a thing as to say that an indictment should conclude with a picture of a drawn sword, since the constitution is the organic law of the

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land, an indictment without that picture would certainly be void; and yet is any logical mind required to admit that the picture of a drawn sword, though required by the constitution, is matter of substance in any indictment? The constitution may arbitrarily make anything it pleases essential to the conclusion of an indictment; but whether the thing required to be in the conclusion of an indictment is matter of substance or matter of form depends on the essential nature of that thing, and not on the arbitrary requirement that it shall be contained in the preface, or in the conclusion of an indictment.

The second contention of the learned counsel for the appellant is that the appellant's demand for a bill of particulars should have been complied with. The true rule on this subject is stated, we think, in 3 Ency. of Pl. & Prac., p. 529: "A party will not be obliged to furnish facts already known to his adversary, nor will a bill of particulars be ordered when the means of obtaining the facts are equally accessible to both parties." See notes 1 and 2, and the numerous authorities therein. It is perfectly obvious from the facts in this record that the appellant knew better than anybody in the case everything which the testimony has disclosed. He kept the books himself, and made all the entries. As a matter of fact, all the books were in the custody of the receiver of the chancery court, and not in the possession of the state. They were consequently just as accessible to the defendant as to the state. He knew, without any bill of particulars, what no bill of particulars could possibly have disclosed, since he himself had made the record which condemned him. The court, therefore, committed no error in refusing the bill of particulars.

It is next very earnestly insisted by learned counsel for appellant that each of the alternative things defined in § 1058 of the Code of 1892 is a distinct offense from each of the other things alternatively therein stated; that, for example, to "embezzle" is one offense, to "fraudulently secrete" is another, to "conceal any goods," etc., another, to "convert to his

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own use any goods," etc., is another, and so on, and so on: The contention seems to be that each of these things denounced by this statute is, in the language of counsel, a distinct offense. The language of the first count is "that the defendant unlawfully, willfully, and feloniously did then and there convert to his own use and embezzle," etc. It will be observed that the word "embezzle" in this statute is not qualified by the use of the word "fraudulently," or any other word. It is said in Bishop's Crim. Proc., sec. 322: "It is believed that the single statutory word 'embezzle'—'did embezzle'—sufficiently indicates the criminal act; just as 'did burn' in arson, 'did make an assault' in an assault, 'did solicit' in attempt," etc. Of course, if the statute contains a qualifying word, such as "fraudulently," or any other, that qualifying word is essential in the indictment; but our statute contains no such qualifying word. If, now, what learned counsel meant by saying that each of these alternative things denounced in sec. 1058 is an offense distinct in its nature and kind from every other one of the alternative things denounced in said statute, this, we think, is a misconception of the meaning of the statute. Each one of these alternative things denounced in this statute doubtless is a separate and distinct act of embezzlement; but each one of them, at least, is an act of the same nature with every other one of them, but all of them are acts of embezzlement. The statute expressly says that any director, etc., guilty of any of these acts, shall be "guilty of embezzlement." In other words, the substantive crime denounced by this statute is one and the same thing—embezzlement. The various alternative stated in the statute are merely different forms of embezzlement.

It is not contended by learned counsel that it was incompetent to prove as many of these different acts of embezzlement as the state could; but the insistence is upon the point we are now considering, the refusal of the court to compel the district attorney to elect as to which single one of all these different

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acts of embezzlement he would proceed upon, and is simply this: that, the evidence being all in, it was then the duty of the court to limit the state to the selection of one single act, and stand or fall as the proof might warrant on that act. We do not think this is the correct view of this statute. It seems to us competent for the court, since the charge is embezzlement, and since all these alternatives are merely different forms and phases of the one substantive crime of embezzlement, not only to introduce all of them in evidence which it could, but to use any or all of them in substantiating the substantive charge of having embezzled a balance of account of $72,000. If, however, we should be mistaken in this view, it is undoubtedly true that, standing at the close of a completed record, as we do, and looking back on a finished trial, it is perfectly manifest that, if any error was committed in the procedure in this respect, it was not reversible error, since the evidence overwhelmingly shows the appellant guilty of every single act of embezzlement shown in the testimony.

We have most carefully gone through the record with respect to each of the other assignments of error, and have particularly examined the charges for the state in view of the criticisms made of them. What we have just said upon the action of the court in refusing to compel the district attorney to elect, and in setting forth our view of the meaning and purpose of sec. 1058, applies perfectly in answer to the criticisms of the instructions for the state. We deem it unnecessary to protract this opinion further by a specific examination of each of the other assignments of error. Suffice it to say that we are fully satisfied that there was no reversible error shown in this record, and that the defendant has not been prejudiced by any of the rulings complained of.

Wherefore the judgment is affirmed.

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Brief for appellant.

TOWN OF OAKLAND v. JOHN MILLER.

[43 South., 467.]

MUNICIPALITIES. *Ordinances. Crimes. Municipal offenses. Felonies. Code* 1906, § 3410.

A municipal ordinance undertaking to make all crimes against the state, including felonies committed within municipal limits, a municipal offense, is void; Code 1906, § 3410, giving all the authority granted in the premises, expressly limits the power to misdemeanors.

FROM the circuit court of, first district, Yalobusha county.

HON. SAMUEL C. COOK, Judge.

Miller, the appellee, was convicted in the mayor's court of the town of Oakland, of violating an ordinance of the town. The specific charge against him was that he unlawfully gave away intoxicating liquor to induce trade, an act punishable as a misdemeanor under the laws of the state. He was fined $90, and appealed to the circuit court. In the circuit court he made a motion to dismiss the charge against him, because, as alleged in his motion, there was no valid ordinance of the town in force prohibiting the act at the time it was committed. The circuit court sustained the motion and dismissed the prosecution.

C. H. Broome, for the appellant.

If the legislature did not intend that an ordinance, such as the one now in question, should be valid and binding, then ch. 75 of the act of 1898, is meaningless and superfluous. This chapter empowers municipal boards to adopt ordinances to the effect that all acts punishable under the laws of this state shall, when committed within the municipal limits, be offenses against the municipality, and be punishable by the municipality. Moreover, Code 1892, § 2938, gives each municipality full

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Brief for appellee.

power to make all needful police regulations for the preservation of good order in the municipal limits.

It would be useless for the legislature to give to the several municipalities the powers conferred upon each municipality by the Code of 1892, unless the legislature also intended to authorize the mayor and board of aldermen to pass one general ordinance like the one now being considered.

The act of 1898 did not define any new offenses, nor did it give municipalities any new powers to define offenses, but its plain and simple purpose was to confer upon municipalities the power to adopt by one general ordinance the criminal law of the state so that the same should be the criminal law of the municipality. Such was the purpose of this ordinance of the town of Oakland.

May, Flowers & Whitfield, for appellee.

The charge against appellee was made in January, 1906, hence the Code of 1892 applies. It is provided by Code 1892, § 3007, that "all ordinances shall be read and considered by sections at a public meeting of the mayor and board of aldermen." Code 1892, § 3008, provides that "an ordinance shall not contain more than one subject, which shall be clearly expressed in its title; and an ordinance shall not be amended or revised unless the new ordinance contain the entire ordinance as revised, or the section or sections as amended, and the original shall thereby be repealed."

Chapter 75, sec. 1, of the acts of 1898, states as follows: "Be it enacted by the legislature of the state of Mississippi, that the boards of mayor and aldermen and mayor and councilmen of the several cities, towns, and villages of this state, in addition to the powers now conferred on them by law, be and the same are hereby authorized and empowered to adopt ordinances declaring all acts which are punishable under the laws of this state, when committed within their corporate limits, offenses

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against such cities, towns and villages, and provide for their punishment."

It is clear that the so-called ordinance, upon which the town of Oakland rests its case, is no ordinance at all, and that the same is null and void. We have shown above the only method whereby ordinances should be passed by municipalities. The town of Oakland passed no ordinance at all according to the code requirements, but merely adopted the provision passed by the legislature which conferred upon the mayor and board of aldermen the *power* to pass ordinances holding offenses against the laws of the state to be offenses against the municipality.

Under this so-called ordinance a man might be convicted in the mayor's court of Oakland of any number of totally different offenses, under the same ordinance. And one might be tried and convicted of a felony before the mayor, if the ordinance, as adopted, were alone looked to. For no distinction is made between felonies and misdemeanors, and no limitations made as to grades of crimes.

By Code 1906, § 3410, the legislature sought to authorize municipalities to provide by general ordinance that offenses against the laws of the state shall be also offenses against the municipalities when committed within municipal limits. But this code section carefully limits the grade of offenses, the language of the section being, "all offenses under the penal laws of the state amounting to a misdemeanor."

WHITFIELD, C. J., delivered the opinion of the court.

The alleged ordinance of the town of Oakland set out in the record is in the following words "Be it ordained by the mayor and board of aldermen of the town of Oakland, state of Mississippi, that all acts punishable under the laws of the state of Mississippi, when committed within the municipality of the village of Oakland, are hereby declared to be offenses against said town and hereby punishable by a fine of not over $100, or imprisonment not exceeding thirty days, or both." This

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ordinance is absolutely null and void, because it attempts to clothe the mayor of Oakland with jurisdiction over felonies, as well as misdemeanors. It expressly provides that all acts punishable under the state laws, etc., shall be punished as offenses against the town. This expressly includes felonies of every grade, as well as misdemeanors. For that reason the ordinance is manifestly void. Code 1906, § 3410, provides that "all offenses under the penal laws of the state amounting to a misdemeanor shall, when so provided by a general ordinance of the municipality, also be offenses against the city, town, or village in whose corporate limits the offense may have been committed with the same effect as though such offenses were made offenses against the city, town, or village by separate ordinance in each case"—carefully limiting the jurisdiction of villages, towns, and cities to misdemeanors. In *Emile Chrisman* v. *City of Jackson,* 84 Miss., 787, 37 South., 1015, the act of 1860 (Laws 1860, p. 304, ch. 261, sec. 4) was sustained, because, as expressly pointed out in the opinion, "the provision was that all offenses against the criminal laws of this state occurring within the limits of said corporation, not amounting to felony, shall be deemed violations of the ordinances of the city of Jackson, and punishable as such." The opinion expressly comments upon the fact that only misdemeanors were dealt with; but this ordinance here under review of the town of Oakland sweepingly provides that not only misdemeanors against the city, but that all felonies against the state, shall be dealt with by the mayor of the town as if he had full jurisdiction.

It is manifestly void, and the judgment is affirmed.

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Statement of the case.

ABEL CANTERBURY ET AL. v. STATE OF MISSISSIPPI.

[43 South., 678.]

1. CRIMINAL LAW AND PROCEDURE. *Assault with intent to murder. Deadly weapon. Indictment.*

An indictment for an assault and battery with intent to kill and murder, charging that the offense was committed with a deadly weapon, is not defective for failure to specify the particular weapon used.

2. SAME. *Altercation ended. New one.*

Defendants who, after an altercation has ended, follow a departing adversary and fall upon him, when they are in no danger real or apparent from him, and stab him with knives until restrained by others are guilty of assault and battery with intent to kill and murder.

3. SAME. *Instructions.*

An instruction is erroneous and should be refused if there be no evidence of which to predicate it.

4. SAME. *Request for instruction. Court not to give without. Code 1906, § 793.*

In a prosecution for an assault and battery with intent to kill and murder the court is without authority under Code 1906, § 793, so providing, to give an instruction to the effect that the jury might find defendants guilty of a lesser constituent offense, in the absence of a request in writing to do so.

5. SAME. *Harmless error.*

It was not prejudicial error, where the evidence overwhelmingly showed a battery as well as an assault with intent to kill and murder, to instruct that the jury might convict of an assault and battery with intent to kill and murder, upon belief from the evidence that defendants were guilty of an assault with such intent.

FROM the circuit court of Smith county.

HON. ROBERT L. BULLARD, Judge.

The appellants, Bud and Abel Canterbury, brothers, were, together with their father, John Canterbury, jointly indicted

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Brief for appellants.

for an assault and battery upon one Samuel Harrison with intent to kill and murder him. At the instance of the district attorney, who desired to secure the testimony of the father, John Canterbury, the court below caused a verdict of not guilty as to John, the father, to be placed upon the minutes of the court. The two brothers, Bud and Abel, were tried jointly; the indictment charging that they did "wilfully, feloniously and of malice aforethought make an assault on one Sam Harrison, with deadly weapons, to-wit, pocketknives, and him, the said Sam Harrison, they, the defendants, with said deadly weapons then and there wilfully, feloniously and of malice aforethought did strike, cut and wound in the attempt and with the intent, him, the said Sam Harrison, with said deadly weapons, wilfully, feloniously and of malice aforethought to kill and murder, against the peace and dignity," etc.

The jury returned a verdict of guilty, as charged in the indictment, and the defendants were sentenced to the penitentiary, Bud for five years, and Abel for seven years.

The facts in regard to the killing, and the points upon which reversal was asked, are fully stated in the opinion of the court.

A. J. McLaurin, for appellants.

The first instruction granted for the state was erroneous. It was as follows:

"The court instructs the jury for the state that even though they should believe from the testimony that Sam Harrison was the aggressor, yet if they further believe from the evidence beyond a reasonable doubt that Harrison abandoned the difficulty and began a flight and if they further believe from the evidence beyond a reasonable doubt that Harrison was pursued by Abel Canterbury and Bud Canterbury and attacked by them with deadly weapons with intent to kill and murder said Harrison at a time when they, defendants, were in no immediate danger, real or apparent, of loss of life or

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Brief for appellants.

great bodily harm, they should find the defendants guilty as charged in the indictment." It is erroneous in several particulars.

1. It does not *define murder,* and, therefore, did not inform the jury what was meant by an intent to murder. *Kearney* v. *State,* 68 Miss., 239, s.c., 8 South., 292; *Hunter* v. *State,* 74 Miss., 519, s.c., 21 South., 305; *Jackson* v. *State,* 79 Miss., 45, s.c., 30 South., 30; *Wood* v. *State,* 81 Miss., 165, s.c., 33 South., 285; *Lofton* v. *State,* 79 Miss., 723, s.c., 31 South., 420; *Harper* v. *State,* 83 Miss., 413, s.c., 35 South., 572. It seems a travesty to tell the jury to convict if the defendants intended to kill and murder, without informing the jury of any of the elements of murder—that it was necessary to be done of malice aforethought, or deliberation, or premeditation. As well instruct the jury to convict if the defendants are guilty.

2. The charge in the indictment is of a joint offense and there is no evidence of conspiracy or concerted action on the part of defendants; and an instruction should not be given without evidence to which it could apply. *Ball* v. *State,* 67 Miss., 362, s.c., 7 South., 353; *Brabston* v. *State,* 68 Miss., 208, s.c., 8 South., 326; *Hogan* v. *State,* 46 Miss., 274; *Association* v. *McConnico,* 53 Miss., 233; *Kinnare v. Gregory,* 55 Miss., 612; *Wheaton* v. *Sexton,* 17 U. S. (4 Wheaton), 508.

3. The instruction denies defendants the right to have the jury consider whether the act would have been murder or manslaughter, had Harrison been killed. *Eaverson* v. *State,* 73 Miss., 810, s.c., 19 South., 715; Wharton on Homicide, sec. 5.

4. The instruction told the jury that a conviction was required if the assault and battery with intent to kill and murder was made with any kind of deadly weapons; whereas, the indictment charged that it was made with pocketknives. *Lanier* v. *State,* 57 Miss., 102; *Porter* v. *State,* 57 Miss., 300; *Dick* v. *State,* 30 Miss., 630; *Commonwealth* v. *McGowan,* 1 Metcalf (Ky.), 368; *Kinnard* v. *State,* 35 Texas Crim.

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Brief for appellants.

Rep., 276; *State* v. *McDonald,* 10 Mon., 21, 24 American St. Rep., 25; *Lunsford* v. *State,* 1 Tex. Ct. App., 448; *Brisco* v. *State,* 4 Tex. Ct. App., 219; *Jordt* v. *State,* 31 Tex., 571; *Lynch* v. *State,* 89 Ala., 18. These authorities demonstrate that the allegation must be supported by the evidence, even where the allegation is a matter of description that need not have been inserted. 1 Greenleaf (15th ed.), secs. 65, 68; *Gray* v. *State,* 11 Tex. Ct. App., 411; *Com.* v. *King,* 9 Cushing (Mass.), 284; *Berrien* v. *State,* 83 Ga., 381.

On the first one of these points I do not deem it necessary to comment further than to make reference to the authorities to which I have referred.

If the court undertakes to instruct the jury at all it ought to instruct it as to some principle of law that does not appear upon the face of the pleading. For instance, on an indictment for murder it would seem idle to instruct the jury to find the defendant guilty of murder if they believe from the evidence that he is guilty of murder, without defining murder. So if the jury is instructed to find the defendant guilty of assault and battery with intent to kill and murder, if the jury believe he intended to kill and murder gives no guide to the jury as to what constitutes murder. It does not tell them that murder has as its basic element malice aforethought, deliberation, or premeditation.

This is a joint offense, and the two defendants ought not to be convicted of two *several* offenses although they are exactly of the kind charged to have been committed by them jointly. The rights of defendants ought to be scrupulously protected. In this particular case the statute provides that they cannot have a severance unless they ask for it before either is arraigned and pleads. Two men may be arrested and brought into court and immediately arraigned and may plead not guilty before they have an opportunity to get a lawyer, not knowing the necessity of a lawyer from the beginning, and then they are denied the right to a severance. Parenthetically, allow me to

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illustrate by this very case, although the illustration does not appear in the record, but I am reliably informed that these defendants were arrested and arraigned and pleaded not guilty before they had an opportunity to employ counsel, and then when their counsel asked for a severance were denied the severance because the application came too late. It is important, therefore, that defendants be protected to the extent that crimes by them severally shall not be permitted to be charged against them jointly and then they be denied a severance. *Ball* v. *State,* 67 Miss., 362, s.c., 7 South., 353; *Elliot* v. *State,* 26 Ala., 78, which in *Ball* v. *State* is said to be the correct doctrine. I contend that the offenses, if offenses at all, committed by Bud and Abel Canterbury were separate offenses,—not joint. There is not the least pretense in the evidence that there was any conspiracy or concerted action between these two defendants. They were not in sight of each other when the difficulty commenced. Preaching was over for the morning and Abel was at the table, where dinner was being served; Bud was on a different part of the ground, at the church house door. After the difficulty commenced and after Harrison had stabbed both Abel and old man Canterbury, and manifestly supposing old man Canterbury killed, had run, Bud Canterbury heard someone exclaim that his father was killed, and started to his father, and saw him bleeding, with an awful gash cut in his throat, and as one of the witnesses for the state described it, "with the whole side of his head cut off," and as another witness for the state described it, "his under jaw was cut through from the back of his ear and into his mouth," and Harrison, running, met Bud, cut at him with his knife and cut his collar, and from that he and Bud engaged in a running fight, into which Abel afterwards fell. Abel testified that he did not cut Harrison at all. But granting that Abel cut him, as well as Bud, each was cutting on his own responsibility and neither was responsible for the act of the other, and had he been killed by one, the other would not have been responsible for the homicide. For this

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Brief for appellants.

I refer to the case of *Brabston* v. *State,* 68 Miss., 208, s.c., 8 South., 326. On p. 219 of that case as reported the court says: "We recognize that if two or more agree to kill another person or do him great bodily harm, and designedly and knowingly co-operate in an effort to accomplish that common purpose, and, in executing that purpose, one of them kill him, all are principals in the homicide, and equally liable in law for it; but *we do not hold* the doctrine that if two men fight in a crowd, with or without deadly weapons, and some outsider, without concert with or knowledge of either of the two combatants, fire at and kill one of them, as his prejudice or prepossession may prompt, the survivor is responsible in law for the homicide." So this doctrine of their joint responsibility is repudiated by the supreme court in the quotation which I have just made. Both Abel and Bud Canterbury testified that they did not see each other during the conflict. Therefore, if there were any offenses committed at all by these two defendants, or either of them, it was several, and not a joint offense. "In homicide,—if without concert, one inflicts an injury on a man one day, and another injures him on a different day, and he dies, the two cannot be indicted jointly; because, in law, under these facts they are not jointly guilty. 1 Bishop, New Criminal Procedure, sec. 470, par. 2; *Regina* v. *Devett,* 8 Car. & P., 639; Archb. Pl. & Ev., 13, London edition 54." Now, if the injuries named in this were a day apart or an hour apart or a minute apart or a second apart, for that matter, it is immaterial. The material thing is that they are *separate* and *independent* injuries, inflicted by different persons. The authority for the proposition that the length of time the offenses were apart is immaterial is found in the case of *Jones* v. *State,* 66 Miss., 380, s.c., 6 South., 231. In that case it was held by the supreme court of this state that Jones could be guilty of an offense in cutting Lloyd and of another separate offense in cutting Thomas, although they were both cut in the same difficulty and practically at the same time. The court also held in that

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Brief for appellants.

case that he could be innocent in cutting Lloyd and guilty in cutting Thomas, although it was in the same fight. This demonstrates as conclusively as a proposition in geometry that the length of time between the two offenses, whether a day or an hour or a minute or a second, is not material, and makes the authority I referred to in First Bishop's New Criminal Procedure, sec. 470, par. 2, as applicable where the two injuries are inflicted by two different persons in different seconds as on different days.

Again the instruction is erroneous because it denies defendants the right to have the jury consider whether the act would have been murder or manslaughter, had Harrison been killed. Wharton on Homicide, sec. 5; *Eaverson* v. *State,* 73 Miss., 810, s.c., 19 South., 715. The instruction is predicated upon the admission that Harrison was the aggressor. The evidence shows that he was the aggressor, with a knife, and that he cut Abel Canterbury on the arm with it over the shoulder of his father, and nearly killed old man John Canterbury. Harrison himself testifies that he had a knife that he had picked up to eat dinner with. In the very nature of the case he was bound to have had that knife, when he first struck Abel Canterbury. On cross-examination this question was propounded to Harrison: "Isn't it a fact, that you was standing at the table with a knife in your hand?" His answer was, "Not at the table"; evidently intending to admit that he had a knife in his hand. Then the next question, "At Mr. Luckey's wagon; weren't you standing back at Mr. Luckey's table with a knife in your hand?" to which he answered, "I don't know, I had it open, got the knife open." Now remembering that he hit Abel but one lick and remembering that instantly after old man Canterbury was stabbed in the side, and his head nearly cut off, Harrison must have had his knife open before the difficulty commenced. Nobody claims to have seen Abel with a knife before he was cut, or before his father was cut, or before Harrison ran, and a number of witnesses testified that Abel ran away and hol-

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lowed for a knife after Harrison had cut him in the arm. This question was asked Harrison: "Isn't it a fact that when you struck him Abel ran and asked someone to give him a knife?" to which Harrison answered, "I don't remember whether I cut Abel or not." The next question then is, "Did you cut at Abel?" and his answer is, "I don't know. I couldn't state. I had a little old knife, and I did the best I could with it to save my life." Now, as he struck Abel but once, and does not know whether he cut him or not, and says he did the best with the knife he could, this also proves that he cut Abel before Abel ever did anything to him except to pull off his coat and offer to fight him. Harrison, in speaking about old man Canterbury, said, "I cut him, never had my hands on him." When he was asked, "Isn't it a fact that all of this part of the jaw fell down and you stabbed him in the back?" (having reference to the father, John Canterbury), Harrison answered, "I don't know whether I did or not." Thus far I have adverted only to the testimony of the prosecutor and the prosecution witnesses. Now note the testimony of Dukes, a witness for defendants, who testified that when he saw the trouble brewing, the father, John Canterbury, had hold of his son Abel, shoving him back, and witness never saw Harrison until the old man had about settled Abel, when Harrison came around from back of the wagon and ran up and cut Abel over his father's shoulder, and as he did so the father, who had about quieted his son Abel, turned to shove Harrison back, who had become the aggressor,—not for the purpose of doing Harrison any violence, but to prevent Harrison's further violence upon Canterbury's son, and Harrison thereupon stabbed this old man, catching him by the whiskers and cut his head nearly off, and then ran. This testimony of Duke's is supported by the testimony of a number of other witnesses, both for the state and for the defendants. "Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter, and so if they, upon such occasion, go

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Brief for appellants.

out and fight in a field; for this is one continued act of passion. So also if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo.* In these and such like cases, the law, kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt, the cool, deliberate act and the result of hasty passion." 1 Wharton on Homicide, sec. 5, also *Brabston* v. *State,* 68 Miss., s.c., 8 South., 326, and *Eaverson* v. *State,* 73 Miss., s.c., 19 South 715; *Morman* v. *State,* 24 Miss., 55; *Gipson* v. *State,* 38 Miss., 310; *Bedell* v. *State,* 50 Miss.; and I contend that this instruction erroneously denied to the jury the right to decide whether it would have been murder had either of the Canterburys killed Harrison.

The first instruction is erroneous in that it authorizes the jury to convict if the assault was made with any kind of deadly weapons, whereas, the indictment charges an assault and battery with *pocketknives.* There is no evidence as to the kind of knives used, or as to the kind of knives that either of the defendants had, except the testimony of one witness that Bud had a knife that looked like a drawing knife. A drawing knife is defined by Webster to be, "A joiner's tool, having a blade, with a handle at each end, used to shave off surfaces by drawing it to one, a shave, also called draw-shave, and drawing-shave. A tool used for the purpose of making incisions along the path a saw has to follow, to prevent it from tearing the surface of the wood." A pocketknife is defined by Webster to be "a knife of one or more blades, which fold into the handle, so as to admit of being carried in the pocket." If there was evidence from which it might be inferred by the jury that the knives used by Abel and Bud were pocketknives the instruction does not call upon the jury to decide that question, but tells the jury that if any deadly weapons were used it is sufficient. In the case of *Lanier* v. *State,* 57

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Brief for appellants.

Miss., 102, the syllabus says as follows: "Under an indictment for assault with a pistol the accused cannot be convicted of an assault with another weapon." This is borne out by the text of the decision, where, on page 105, this language was used by Chief Justice GEORGE, to-wit: "It is true that under the indictment the jury were authorized to convict of an assault with a pistol *only.*" It was necessary to mention that the assault and battery was committed with a deadly weapon. Code 1892, § 967. Then this language is used by Greenleaf, sec. 65, p. 103, of the 15th edition: "But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved; for they are all made essential to the identity." See also sections 56, 57 and 58. In section 58 this language is used, to-wit: "In the first place, it may be observed that any allegation which narrows and limits that which is essential is necessarily descriptive." Now if this description is unnecessarily particular it must, nevertheless, be proven. *State* v. *Newland,* 7 Iowa, 242; 71 American Decisions, 444. In that case the syllabus, which is borne out by the text, uses this language, to-wit: "Where a person or thing necessary to be mentioned in an indictment is described with unnecessary particularity, all the circumstances of the description must be proved." See also *Gray* v. *State,* 11 Tex. App., 411. These are sufficient authorities to sustain the proposition that I make, that the restriction of the weapon to a pocketknife is not such surplusage as can be rejected. It probably would have been sufficient to describe the deadly weapon as a knife—I am not prepared, however, to say that it would be sufficient—but when it is described as a pocketknife, then whether this is unnecessary particularity or not it must, according to the authorities I have named, be proven to have been a pocketknife. Otherwise, there is a variance between the allegations and the proof. 1 Greenleaf, secs. 56, 57, 58, 65; *Gray* v. *State,* 11 Tex. Ct. App., 411; *Berrien* v.

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Brief for appellants.

State, 83 Ga., 381; *Com.* v. *King,* 9 Cushing (Mass.), 284; *Stratton* v. *State,* 13 Ark., 688; *Lanier* v. *State,* 57 Miss., 102; *Dick* v. *State,* 30 Miss., 300. But this instruction tells the jury that it is not necessary to prove the weapons to have been pocketknives, but that if they were any kind of deadly weapons it was sufficient to sustain the indictment. It seems to me clear that this is such a glaring error as to call for a reversal of the case. With this error committed in the instruction the defendants did not have the benefit of a correct enunciation of the law to the jury and having been convicted upon erroneous enunciation of the law were subjected to severe penalties, and have been undergoing imprisonment in the jail since the trial.

There is another serious error in this first instruction. The indictment is for assault and battery with intent to kill and murder, yet this instruction says that if the defendants attacked Harrison with deadly weapons they should be found guilty as charged, which means assault and battery with intent to kill and murder. Now, they may not, according to that instruction, have been guilty of doing more than assaulting him, because "attack" means to assault—3d Cyc., p. 1033; *Wilson* v. *State,* 53 Ga., 205—yet they are told that upon committing an *assault* with deadly weapons with intent to kill and murder they are to be found guilty of assault and *battery* with intent to kill and murder. *Bryant* v. *State,* 41 Ark., 359; *Young* v. *People,* 6 Ill. App., 434.

The second instruction for the state is probably not erroneous in so many particulars as the first one; but it has one error in it that is utterly fatal. The instruction reads as follows: "The court charges the jury for the state that if from the evidence they believe beyond a reasonable doubt that defendants, Abel Canterbury and Bud Canterbury, made an assault on Sam Harrison with deadly weapons, or if they made an assault and cut and wounded the said Harrison with deadly weapons, to-wit: pocketknives, with intent to kill and murder him, the said Sam Harrison, as charged in the indictment, at

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a time when they, the defendants, were in no immediate danger, real or apparent, of loss of life or great bodily harm, then the jury should return a verdict of guilty as charged in the indictment." This instruction charges the jury in the alternative. The first alternative is that if the defendants made an assault on Sam Harrison with deadly weapons they are to convict. The second is that if they made an assault and cut and wounded Harrison with pocketknives with intent to kill and murder him they are to convict. Surely the assault on Harrison with deadly weapons would not justify a verdict of guilty of assault and battery with intent to kill and murder. If it be said that the instruction meant something other than it said, then it was erroneous because it was not explicit enough to be understood and was, therefore, confusing. An instruction should be instructive as to the law, and not confusing.

It was error to modify the twelfth instruction asked by the defendants by striking out the words, "and to pursue Sam Harrison." 1 East P. C., 271; *State* v. *Thompson,* 9 Iowa, 188, 192; 1 Bishop on Criminal Law (7th ed.), sec. 853. In this section of Bishop this language is used: "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony; such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill him in so doing, it is called justifiable self-defense." Bud Canterbury testified that after Harrison struck at him with his knife, he struck back, and that Harrison then ran his hand in his bosom as if about to draw a pistol, and then he followed him with his knife. The state, it will be noticed, when Bud Canterbury started to tell what he thought if he didn't jump right on Harrison, objected, and seems to have interrupted the connection of his testimony; but there is enough of it to show that he thought he was in danger from a pistol if

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Brief for appellants.

he didn't pursue the advantage he had. Several other witnesses (some of them state's witnesses) testified that they feared Harrison would shoot and that they got out of line for that reason. So the part of the instruction that was stricken out was applicable to the case, and ought to have remained in the instruction.

J. J. Stubbs, on the same side.

The first instruction for the state was fatally defective, for as granted it excluded any consideration of heat or passion.

The second instruction for the state was also fatally defective, for it directed conviction of *assault and battery* with intent to murder, although the defendants were guilty only of an assault with deadly weapons. The word, assault, does not include in its meaning the word, battery. Code 1906, § 1043. The indictment merely says that the defendants "did unlawfully, wilfully, feloniously and of malice aforethought *make an assault* on one Sam Harrison, with deadly weapons, to-wit, pocketknives." The instruction extended its sway beyond the limits of the charge in the indictment.

The court erred in modifying the twelfth instruction asked by appellants. The modification consisted in the striking out of the instruction the words, "and to pursue Sam Harrison." By reason of the modification of this instruction, it was not read to the jury. It was error to so modify it. *Fortinberry* v. *State,* 55 Miss., 403.

The verdict of the jury was not supported by the law nor by the evidence. And a new trial should have been granted the appellants. If the wounds inflicted on Harrison had resulted in his death, appellants, at most, would have been guilty only of manslaughter. *Cotton* v. *State,* 31 Miss., 504; *Beasley* v. *State,* 64 Miss., 518, s.c., 8 South., 234; *McLaurin* v. *State,* 64 Miss., 529, s.c., 1 South., 747; *Kelly* v. *State,* 68 Miss., 343, s.c., 8 South., 745; *Jackson* v. *State,* 79 Miss., 42; *Rowland* v. *State,* 83 Miss., 483, s.c., 35 South., 826. The jury were

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not warranted in bringing in the verdict which they did against the appellants, hence the judgment should be reversed.

R. V. Fletcher, attorney-general, for appellee.

It is earnestly contended by the learned counsel for the appellants that the first instruction granted to the state was faulty in that it authorized the jury to find the appellants guilty under certain conditions, if the jury believed that the attack was made with deadly weapons, without specifying that the deadly weapons were pocketknives. This contention is founded on the fact that the indictment charges that appellants made the assault upon Harrison with pocketknives. Opposing counsel insist that since the district attorney saw proper to designate specifically the kind of knives used, such allegations in the indictment become a material and descriptive part of the offense, and must be supported by the proof, and be specifically referred to in the charges to the jury.

There are two answers which may be made to this contention. In the first place, it is not at all necessary to describe the kind of weapons which were used, and the designation, "pocket," in reference to the knives, may be dismissed as surplusage. In the second place, it is submitted that a fair and practical view of the proof will show that the knives used were pocketknives.

It seems to be perfectly well settled that, both at common law and under statutes which do not specify the instrument, it is unnecessary in an indictment to state the means or instrument made use of by an assailant to effectuate his murderous intent. 1 Wharton Crim. Law., 602, and authorities there cited.

The recital, therefore, of "pocketknives" in the indictment, was unnecessary, and might be rejected as surplusage. It is argued, however, that if the indictment specifies the kind of instrument, it must be proved even to the most minute detail. Many larceny cases are cited by opposing counsel, but these

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Brief for appellee.

cases are not in point. In larceny it is essential to charge that some article was stolen, and the stolen article must be stated in the indictment. If the stolen article is described with unnecessary particularity, then such description must be proved. But in this offense the nature of the weapon need not be charged.

Precedents are not wanting in support of the doctrine that upon indictment for assault with pocketknives, a similar weapon may be proved. Thus, it is said, in an Alabama case, "the indictment charges the assault to have been made with a razor. There was evidence to show that the assault was made with a pocketknife. The lower court instructed the jury in substance that it was immaterial whether the assault was made with a razor or pocketknife, and refused to charge at the request of the defendant, that if the jury had a reasonable doubt as to the assault being made with a razor, they must acquit the defendant. It is sufficient if the substance of the charge be proven, without regard to the exact instrument used. Though the indictment charges a particular weapon, the averment is substantially proved if it be shown that some other instrument was employed, which occasions a wound of the same kind as the instrument charged and the consequences naturally follow." *Hall* v. *State,* 79 Ala., 32.

This statement of law has the highest sanction from Mr. Bishop, who used this language: "In homicide and other assaults there must be a not easily defined harmony of a general sort between the allegations and proofs of the act, but the same need not be minute. For example, it has been held that a charge of assault, 'with a weapon, to-wit, a gun,' is not sustained by evidence of an assault with the hand. But where the instrument proved is of the same nature as that alleged,—as where a homicide is charged to have been committed with a piece of iron, and the evidence was that it was with a piece of plank,—there is no variance." 1 Bishop's Crim. Proc., sec. 488, c.

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Brief for appellee.

The law being thus, it is manifest that the state's first instruction, which does not specify the kind of deadly weapon, is not erroneous, since all of the proof shows that the assault was made with knives, and the principle above announced has direct and conclusive application.

In the second place, it is admitted that the record, taken as a whole and fairly considered, sufficiently shows that the knives used were pocketknives. Of course, it is not necessary for the state to show by direct testimony the character of the knives. This may be inferred from the circumstances surrounding the participants, their use of the weapons, the sources from which they were procured, and other circumstances. *Porter* v. *State,* 57 Miss., 300.

Much emphasis is laid by learned counsel for appellants on the fact that these appellants are charged with a joint crime, and it is insisted that the proof does not support the charge. But, in view of the state's testimony that both appellants, at the same time, in full view of each other, were pursuing Harrison with knives, and fell upon him at about the same time, both doing their best to kill him, it is submitted that the proof was ample to warrant the jury in concluding that this was a joint assault.

Considering now the second charge for the state, the only complaint made by the appellants is upon the ground that the charge is in the alternative, and that the first part of the charge should be considered separate and apart from the rest, and that, so considered, appellants are deprived of the right of self-defense; but the conclusive answer to this objection is that both the first and second alternatives are modified equally by that part of the charge which begins with the words, "with the intent to kill and murder him," etc. So considered, the charge is not subject to the criticism offered.

Argued orally by *A. J. McLaurin,* for appellant, and by *R. V. Fletcher,* attorney-general, for appellee.

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Opinion of the court.

MAYES, J., delivered the opinion of the court.

There are nineteen assignments of error in this case, but few of them are pressed seriously. We have carefully considered them all, and concur that none of them is well taken, except that our Brother CALHOON maintains that the first instruction for the state is erroneous, and that the modification of the twelfth instruction for the defense is erroneous, and that the second instruction for the state is erroneous. With the exceptions indicated in the dissent of our brother, we all concur that no one of the other assignments of error is well taken.

Concerning the contention that the indictment should charge the specific weapon with which the assault and battery was committed, and that it is not sufficient to charge that it was committed with a deadly weapon, we merely observe, first, that we have examined carefully all the authorities cited by the learned counsel for appellants, and find that they do not sustain the contention; and, second, that any fair reading of this testimony, taken as a whole, shows that the knives used were pocket-knives. See 1 Wharton's Criminal Law, p. 602; *Hull* v. *State,* 79 Ala., 32; 1 Bishop on Criminal Procedure, sec. 488; *Porter* v. *State,* 57 Miss., 300.

The case made by the facts in this record is briefly as follows: Sam Harrison had been operated upon for appendicitis and was in an enfeebled condition. A brother of Harrison had killed a brother of the Canterbury boys. So far as this record is concerned, it does not appear that Sam Harrison had any connection with that killing. This difficulty occurred on Sunday at a church meeting. Harrison and Luckey were under a tree, some little distance away, preparing to eat dinner. Abel Canterbury during the morning had been grimacing at Harrison and frowning at him wherever he chanced to see him. Abel and Crosby walked up to where Harrison and Luckey were sitting, and Crosby exchanged greetings with Harrison and Luckey. Harrison did not speak to Abel Canterbury, but Abel Canterbury insisted that he had done so. Harrison kept

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insisting that he had not spoken to him, and that he did not want to have any trouble with him. Abel Canterbury pulled off his coat and said he was the best man on the grounds. Old man Canterbury got in between them, and tried to keep them apart; but Abel kept coming closer and closer, and finally he and Harrison got together. Harrison struck Abel Canterbury over old man Canterbury's shoulder, according to the testimony of the defense, and old man Canterbury struck Harrison in the back. Both of these blows, apparently, seem to have been with knives. Abel Canterbury rushed off and snatched a knife from some one on the grounds, and turned and made for Harrison, who, having cut old man Canterbury, undertook to run away. This is the first stage of the difficulty. It is obvious that the difficulty was brought on by Abel Canterbury, and that Harrison was in no manner to blame for its commencement. After Harrison fled, all three of the Canterburys pursued him with knives in their hands, Harrison retaining his knife. Old man Canterbury was so badly wounded that he stopped, the two appellants still pursuing Harrison with drawn knives. They chased him for about fifty yards. At the corner of the schoolhouse Bud Canterbury and Harrison exchanged licks, Bud Canterbury stabbing him in the shoulder, and Harrison cutting his collar. Harrison kept up his flight around the house, and finally stumbled and fell to the ground, and both the appellants fell on him. They both got on him and stabbed him many times, or, as one witness expresses it, "for all they were worth." In this condition, Harrison lying on the ground and both the appellants sitting on him, stabbing him, Abel Canterbury's sister got hold of his arm, trying to stop the trouble. He jerked himself free of her, when a Mr. Curry came up and with a stick which he had in his hand prevented Abel Canterbury from further stabbing, by interposing his stick between the blow and the body. Whereupon Abel Canterbury threatened him by saying that if he did not stop interfering with him he would cut him, and it was only upon the

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arrival of several other men, who took charge of Abel Canterbury, that he could be pulled off the prostrate man. Bud Canterbury, also, had to be taken off by force by several parties. This is this case, as plainly made out by the testimony for the state in this record. It is further to be observed that the district attorney, with commendable fairness, put on the stand nearly all the eyewitnesses who saw the whole transaction. The witnesses for the defense are composed partly of relatives of the appellants, but mostly of those who did not see the entire difficulty, but mainly what took place at the wagon between John Canterbury (the old gentleman), Abel Canterbury, and Harrison. The motive impelling Abel Canterbury seems to have been the difficulty between Harrison's brother and his brother.

On this case it is impossible to doubt that the defendants intended to kill and murder. The contention that these two appellants did not intend to kill and murder Harrison, when the testimony shows that they chased him for fifty yards with drawn knives, falling upon him when he had fallen to the ground in a helpless condition; stabbing him with their knives, and stopping only after the most strenuous effort; threatening those who sought to draw them off—but were acting in self-defense and had the right to pursue a man fleeing for his life in order to save their own lives, is one, to put it mildly, that utterly fails to commend itself to our minds. Was it necessary to the preservation of the lives of these two appellants, or to save them from any great bodily harm, that they should chase a man in full flight for fifty yards, and then pounce upon him while he was down and helpless? It is impossible for us to conceive how any serious contention can be made that these two appellants could, in any imaginable way, have been in danger from Harrison, while he was in full flight, of death or great bodily harm. On this state of the case the court gave instruction number one for the state, set out in the dissenting opinion, which we think states the case precisely as it ought to have

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been stated, announcing the law applicable to the facts with absolute correctness. The testimony abundantly shows that Harrison had abandoned the difficulty and was fleeing for his life, and was then pursued by the appellants, fallen upon, and stabbed whilst he was on the ground, when neither of the defendants could have been in the slightest danger of death or great bodily harm at his hands.

The twelfth instruction for the defendant is as follows: "The jury are instructed, for the defendants, as a matter of law, that if they believed, and had reasonable cause to believe, that Sam Harrison had sought them out for the purpose of killing them, or of doing them great bodily harm, and that Sam Harrison was prepared therefor with deadly weapons, and that Sam Harrison made demonstrations manifesting an intention to commence an attack, then the defendants or defendant so threatened were not required to retreat; but they had the right, under the law, to stand and defend themselves, and to pursue and if in so doing it was necessary, or upon reasonable grounds Sam Harrison until they had secured themselves from danger, it appeared to be necessary, to commit an assault and battery with intent to kill Sam Harrison, their acts are excusable upon the grounds of self-defense, and if the jury so believe from the evidence they must find the defendants not guilty." This instruction was modified by the court, but not read to the jury. The first observation to be made about this instruction, which was given with the simple modification of striking out the words "and to pursue Sam Harrison," is that, as asked, it was manifestly erroneous on the case made. There was not a scintilla of evidence in the case to show that "Sam Harrison had sought them out for the purpose of killing them, or of doing them great bodily harm," or that Sam Harrison "made demonstrations manifesting an intention to commence an attack. Abel Canterbury began the difficulty beyond any controversy, Harrison seeking to avoid trouble, and the instruction as given was manifestly erroneous, for the reason that there was no evidence to

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sustain it. Being erroneous as asked, for the reason that there was no testimony to support the instruction, the modification did not cure the error, and the instruction as modified should have been refused by the court. This being the case, no error could be predicated on this instruction, because the court modified it and the defendant did not use it, because the instruction was wrong as asked and as modified, and the failure to use an erroneous instruction can never constitute reversible error. We repeat that no evidence can be found in the record to support this charge, and that the only error the court committed was against the state in granting to the defendant, even as modified, an instruction wholly unwarranted by the testimony. The only demonstration Harrison made after the trouble at the wagon was to flee for his life, and if at that time the appellants had stopped, as they ought to have done, being themselves in no manner of danger, there might have been something in their contention that what they did up to that time was done in the heat of passion.

Our dissenting brother earnestly contends that it was the duty of the court to give a charge to the jury that they might find a verdict less than a verdict of assault and battery with intent to kill and murder, and that there was evidence tending to show that what was done was all done in the heat of passion. We cannot agree with him in this view of the case made by the evidence. As stated, these appellants chased this man fifty yards, fell upon him, and stabbed him when he was down and helpless. It seems to us to be utterly unreasonable to contend that this was in the mere heat of passion, and the jury have so found. As to the insistence that it is the duty of the court to give a charge to the jury that they might find a less verdict than a verdict of assault and battery with intent to kill and murder, the conclusive answer is that in this state the law has absolutely taken from the judge the right to give any charge to the jury in any state of case, unless that charge is requested by the parties to the litigation in writing. The circuit judge is

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helpless in the matter. The citation from p. 212, vol. 11, Ency. of Pleading and Practice, is good law in those states in which judges are permitted to charge the jury what the law is, as in the English practice and the federal practice; but it has no application in this state under our peculiar statute about instructions. The law in our state on this subject is set down in terms too plain to be misunderstood. In the case of *Archer* v. *Sinclair,* 49 Miss., 343, SIMRALL, J., delivering the opinion of the court, said: "The parties have a right to indicate, by written requests, the points upon which they respectfully desire the jury to be informed as to the law. Under our system it would not be proper for the court to instruct *sua sponte.*" It seems perfectly clear, from the course the trial took, that the defense fought this case out below on the issue of self-defense, purposely declining to ask instructions suggesting that the defendants might be guilty of something less than that charged; and the state also fought it out on the issue that the appellants were guilty as charged, or not guilty at all. The appellants cannot be permitted to experiment with the courts in this fashion. They will not be allowed intentionally to decline to ask charges presenting to the jury the theory that they might be guilty of an attempt to kill and slay, growing out of the heat of passion, and not of an attempt to kill and murder, seeking to obtain a clear acquittal on the ground of self-defense in the court below, and then for the first time in this court complain that the court did not of its own motion give a charge about a lesser offense, which charge they themselves studiously avoided asking. Nothing in the world was easier than for the appellants to have asked such a charge. They did not do it, and the court was by the law prohibited from giving any instructions for the defense except those which they asked in writing. The court cannot be blamed, therefore, for the absence of such a charge in this record, since the appellants, who alone could have asked it, declined to do so.

The only error we deem it necessary to advert to is the as-

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signment that the second charge is erroneous, because it told the jury in the alternative that, if they believe beyond a reasonable doubt that appellants made an assault simply, they might nevertheless be convicted of assault and battery, the indictment charging assault and battery. Viewed as a mere abstract proposition, it undoubtedly is an incorrect statement of the law to say that, where an indictment charges an assault and battery, the jury may convict of assault and battery, although they only believe from the evidence the defendant to be guilty of an assault. But the indictment here charges assault and battery both. The evidence overwhelmingly shows both assault and battery to have been committed by both these appellants, and the error amounts to nothing—could have had no possible influence on the verdict. Nobody contends, except the two appellants themselves, that they did not stab Harrison on the ground after chasing him. It is true both appellants swear positively that neither saw the other stab Harrison while lying on the ground. It is further true—a most astonishing statement—that each swears that he did not see the other on Harrison.

On the whole case, it seems to us, after the most patient consideration, that the learned circuit judge charged the law with great accuracy, except in charging far too favorably for the defense in the twelfth instruction; that the district attorney acted with great fairness in putting on the stand all eyewitnesses who saw the whole difficulty; that the verdict is right, and that no other result could possibly be reached on any reasonable view on another trial; and that the judgment should be, and hereby is AFFIRMED.

CALHOON, J., delivered the following dissenting opinion:

In this case there was testimony tending to show self-defense, and much stronger evidence to show that the actions of the accused were in the heat of passion, naturally engendered, without malice aforethought, which would, if Harrison had been

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killed, have reduced the homicide to manslaughter. There was no instruction for either the state or defense defining either murder or manslaughter.

The court gave only two instructions at the instance of the state. They are as follows: Number One: "The court instructs the jury, for the state, that even though they should believe from the testimony that Sam Harrison was the aggressor, yet if they further believe from the evidence beyond a reasonable doubt that Harrison abandoned the difficulty and began a flight, and if they further believe from the evidence beyond a reasonable doubt that Harrison was pursued by Abel Canterbury and Bud Canterbury, and attacked by them with deadly weapons with intent to kill and murder said Harrison at the time when they, defendants, were in no immediate danger, real or apparent, of loss of life or great bodily harm, they should find the defendants guilty as charged in the indictment." Number Two: "The court charges the jury, for the state, that if from the evidence they believe beyond a reasonable doubt that defendants, Abel Canterbury and Bud Canterbury, made an assault on Sam Harrison with deadly weapons, or if they made an assault and cut and wounded the said Sam Harrison with deadly weapons, to-wit, pocketknives, with the intent to kill and murder him, the said Sam Harrison, as charged in the indictment, at a time when they, the defendants, were in no immediate danger, real or apparent, of loss of life or of great bodily harm, then the jury should return a verdict of guilty as charged in the indictment."

The following instruction was given for the defense, but only as modified by the court, as will appear: Number Twelve: "The jury are instructed, for the defendants, as a matter of law, that if they believed, and had reasonable cause to believe, that Sam Harrison had sought them out for the purpose of killing them, or of doing them great bodily harm, and that Sam Harrison was prepared therefor with deadly weapons, and that Sam Harrison made demonstrations manifesting an intention to

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commence an attack, then the defendants or defendant so threatened were not required to retreat; but they had the right under the law to stand and defend themselves, and to pursue Sam Harrison until they had secured themselves from danger, and if, in so doing, it was necessary, or upon reasonable grounds it appeared to be necessary, to commit an assault and battery with intent to kill Sam Harrison, their acts are excusable upon the grounds of self-defense, and if the jury so believe from the evidence they must find the defendants not guilty." This was modified by the court, and not read to the jury. The modification is that the court erased the words, "and to pursue Sam Harrison."

It will be observed that instruction Number One for the state fully presents the theory of the prosecution that even if Harrison was the aggressor, still if he abandoned the difficulty, and "was pursued" by the accused with intent to kill and murder him, they should be convicted. Granting that this was correct on this line of thought, it is quite notable that the accused were refused the correlative proposition that they had the right to pursue him if they believed, from his demonstrations, that it was necessary to their security. This refusal to them and agreement to the counter request of the state plainly emasculated the defense of its constitutional right to an impartial trial, and affects seriously the status of all citizens, however innocent, who may be indicted. The right to pursue, when apparently necessary to self-defense, is too thoroughly settled for any sort of disputation, and the right to have the jury so instructed is plain, where there is, as here, testimony in support of it.

In Ency. Pl. & Pr., vol. 11, p. 212, we find this in the text: "If there is evidence tending to reduce the grade of the offense, it is the duty of the court to give in charge the law applicable to that grade of offense, and it makes no difference that the evidence tending to reduce the grade of the offense is very slight, or that the only evidence tending to reduce the offense

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is the testimony of the defendant himself." See, also, *Id.*, 215. So far as I know authorities *contra* cannot be found in the books, English or American. The proposition is vital for the protection of the innocent, as all are primarily presumed to be. The jury, not the court, determine the probative force of what the witnesses testify. The same volume of the same book, on page 215, says: "An instruction correct in point of law and applicable to the evidence should always be given, no matter how slight the evidence in support of the hypothesis on which the evidence is based. The instruction, if pertinent, should be given, without regard to the weight or preponderance of the evidence." Mississippi has announced this rule and applied it in civil and criminal cases: *Levy* v. *Gray,* 56 Miss., 318; *Hursey* v. *Hassam,* 45 Miss., 134; *Nichols* v. *State,* 46 Miss., 284; *Rivara* v. *Ins. Co.,* 62 Miss., 720. It is wholly immaterial what view the court may take of the facts. They are for the sole determination of the jury, and it is of vital importance to the citizen that a jury of his countrymen shall pass on the truth of such facts as are favorable to him, even though he alone testifies to them. No court has ever yet, since the incumbency of JEFFREYS, been so autocratic as to deny this salutary rule. The only instances where judicial tribunals have taken charge of testimony and evidence and erroneous instructions occur where the testimony of the defendant himself makes out a case of guilt as charged.

The first instruction for the state is also fatally defective in excluding any consideration of heat of passion. It tells the jury they "should find the defendants guilty as charged in the indictment"—that is, of assault and battery with intent to kill and murder—if satisfied beyond reasonable doubt Harrison was pursued and "attacked" by the accused "with deadly weapons with intent to kill and murder" him, etc. "Kill and murder" is strictly a legal phrase, and yet murder is not defined and differentiated from manslaughter in this or any other instruction on either side. Juries are not supposed to be lawyers, or

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to discriminate between murder and manslaughter. If Harrison had been killed, it is my opinion that the verdict, under proper instruction, would have been for manslaughter at most.

The second instruction for the state is flagrantly erroneous, not only because it has the vice of the first, just noticed, but directs conviction of assault and battery with intent to kill and murder, even though defendants were guilty only of an assault with deadly weapons. It cannot be true in Mississippi that one may be convicted of a battery when he committed an assault only. An assault is an attempt to commit a battery. It is included in a battery; but a battery is not included in an assault. The clauses of Code 1906, § 1043, make separate offenses. *Morman* v. *State,* 24 Miss., 54. And, as one may be convicted of only what he did, instructions should be specific. An assault with intent, etc., is not an assault and battery with intent, etc. *Montgomery* v. *State,* 85 Miss., 330, 37 South., 835; 1 Wh. Crim. Laws, sec. 640. At no time in any case is a defendant called upon to ask any instruction modifying guilt, or in exculpation. He is at arm's length. But at all times, in all cases, the state must charge the law, if at all, on that on which it must stand or fall, unless the defense asks some instruction neutralizing any error. In announcing a different rule, or making it incumbent on the defense, under any circumstances, to ask a charge about anything, or under any phase of the case, I submit that there is manifest error in the majority opinion. Defendants need not correct the state's errors.

The majority opinion is quite full and accurate in stating the case made in the testimony for the state, but is curiously silent as to that delivered on the part of the defense. It does state that: "Nobody contends, except the two appellants themselves, that they did not stab Harrison on the ground after chasing him. It is true both the appellants swear positively that neither saw the other stab Harrison while lying on the ground. It is further true—a most astonishing statement—that each swears that he did not see the other on Harrison." From my

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standpoint the statement of the defendants themselves is ample ground for the propositions laid down in this dissenting opinion. There is absolute conflict between the impressions of the majority and my own impressions about the facts in this case. From my understanding, upon a fair review of the evidence, the facts are that Abel Canterbury and Harrison had a misunderstanding; Abel saying that Harrison had spoken to him and Harrison denying it. At this juncture Abel took his coat off, manifestly for a fist fight, and also, manifestly, when Abel was entirely unarmed. Thereupon Harrison started towards Abel, when old man John Canterbury, the father, got between them in order to prevent conflict. At this time, and for the first time in this whole controversy, Harrison attempted to rush on Abel with a knife drawn in his hand, and reached over old man John Canterbury's shoulder, stabbed Abel in the arm, and then attempted to cut old man Canterbury's throat, and did make such a tremendous and long gash from near the temple down into the throat that the bystanders thought the old man was killed, and the outcry was from the crowd that "Sam Harrison has cut old man Canterbury's head off." It is thus baldly manifest that Sam Harrison was the aggressor with a deadly weapon, and that, if he had then slain either old man Canterbury or his son Abel, it would have been a glaring case of murder.

It will be noted here that the indictment is a joint indictment against old man Canterbury and both of his sons, Abel Canterbury and Bud Canterbury. The district attorney, of course, very properly caused a verdict of not guilty to be entered in favor of John Canterbury, the old man. It is also absolutely certain that Bud Canterbury was not present at that time. It appears from the testimony for the defense, and I think cannot be successfully disputed, that Bud Canterbury, hearing the outcry that his father had been killed, started to go to him, when he met Sam Harrison, who endeavored to kill him and cut his clothing as he passed him, and thereupon Bud Can-

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terbury started in pursuit, and, without concert, he and Abel were equally in pursuit. It is also true by the testimony of the defense that, while Sam Harrison was running off, it may be running to make his escape under the impression, which he might well have had, that he had killed old man Canterbury, he had his hand as if on a pistol threatening his pursuers, which, if true, warranted the pursuit. It is also certain that Sam Harrison stumbled and fell, and that his two pursuers fell on him; but both swear that they did not cut while he was down. Bud had struck him a blow with a knife after Harrison had struck him. While it may be perfectly obvious, as the majority opinion indicates, that it is too plain that the difficulty was brought on by Abel Canterbury, this can only be true on the basis that Abel was taking his coat off for a fist fight, which at no period of the quarrel warranted Harrison in assaulting him and his father with a deadly weapon. Besides this, the postulate of the majority opinion is not sustained that old man Canterbury pursued Harrison with a knife. The only mine from which this can be drawn is the testimony for the state, which I regard as overthrown, and certainly it is overthrown by the verdict of not guilty as to the old man. It is true that Bud Canterbury, who was never at the scene where his father was cut nearly to death, did stab Harrison as he met him; Harrison first cutting at him.

But all this matter of testimony *pro* and *con* can only properly be considered in determining the propriety of the action of the court in charging the law. It is true that, where the defense itself makes out a case of guilt, errors in instructions need not be noticed. It is also true that where there are instructions on both sides, and there is technical error in an instruction given for the state, the court will not notice the error, where, taken as a whole, it plainly appears that the jury could not have been misled; but these are not this case, and I stand on the proposition that wherever Anglo-Saxons live, a defendant has the right, even upon his own testimony alone, to have

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an instruction given based upon his testimony, so that the jury may finally determine the facts. I also stand on the proposition that it is improper, and a reversible error, for any court, particularly in a case like that before us, to charge the jury that if they believe only an assault was made with intent to kill and murder, without defining what murder means, they should convict of assault and battery with intent to kill and murder. When we depart from these basic principles, the rights of men are tossed about by the caprices of courts, and we are at large on an anchorless ocean, with no haven landlocked by the everlasting principles of law. On one announcement of the majority opinion I am reminded and my attention is called to the fact that the twelfth instruction asked by the defendant and modified by the court was not used before the jury. I say further on this point that there was ample testimony that Sam Harrison did seek out Abel Canterbury to kill him, and did in fact try to kill him, and did in fact also try to kill old man Canterbury. True it is that Abel Canterbury made the first warlike demonstration, in that he commenced to pull his coat off, which was no more than an invitation to a fisticuff fight. But it is plain that thereupon Harrison did advance on him to kill him, and, while his father had backed him up against a wagon, Harrison rushed in, reached over the father's shoulder, stabbed Abel, and then cut the old man's throat. Under this state of facts it is idle to discuss the question that Abel Canterbury could possibly have been guilty of no more than manslaughter, at the most, if he had run after and killed Harrison. There was no cooling time under any view of the law or of human action.

I deny utterly that there is any distinction whatever in the granting or refusal of instructions between our system of asking written instructions and the English system of oral charges. It is true that neither side need ask an instruction; but, whenever one is asked, it must be a proper instruction, and, if not proper, it must be refused or modified to cover the case. This

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principle is repeatedly announced in adjudications of our own court from the date of its territorial government up to this time; and let it be noted that the principle is derived from the common law, and is as old as the common law itself, and has never been deviated from in any case in my knowledge, except that now in hand. The majority opinion agrees with my view that, as an abstract proposition, it is not proper to convict of an assault and battery where only an assault is charged and proved; but the majority opinion says that the indictment charges both assault and battery here, and the evidence overwhelmingly shows both assault and battery to have been committed, and that therefore the error amounts to nothing. I say that it is for the jury to determine whether or not there was an assault and battery by the two Canterburys, and that it is exceedingly dangerous for courts to be assuming the prerogative of the jury. I have an abiding faith that there was error, and, whether these men be guilty or innocent, it is equally important for the courts to so declare. Courts sentence. The jury only can convict a freeman, and then only on the law properly charged, if charged at all.

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CITY OF NATCHEZ v. CHRISTINA LEWIS.

[43 South., 471.]

MUNICIPALITIES. *Defective sidewalk. Personal injury. Knowledge of defect.*

A municipality which allows a dangerous hole to remain in its sidewalk for several months without taking any precautions to give warning of the danger is liable to one who steps into the hole and is injured while going along the walk, which was inadequately lighted, on a dark rainy night, although such person knew that the hole existed and the injury resulted from momentary forgetfulness of its presence.

FROM the circuit court of Adams county.

HON. MOYSE H. WILKINSON, Judge.

Christina Lewis, the appellee, was plaintiff in the court below; the city of Natchez, the appellant, was defendant there. From a judgment in favor of the plaintiff defendant appealed to the supreme court.

The plaintiff's suit was for recovery of damages for personal injuries sustained by her by reason of defective condition of a sidewalk on one of the streets of the city. The evidence showed that the city for several months before plaintiff's injury allowed a hole to exist in the sidewalk, and up to the time of plaintiff's injury took no precautions to give warning to pedestrians of the defect; the hole was twelve inches or more in length, and about eight inches in depth, and slanted downward and outward toward the street; the nearest street-light was some distance away and obscured by trees. The plaintiff, late at night, in company with her stepson, was going home along this sidewalk; it was dark; a drizzling rain was falling; to avoid the mud plaintiff was walking on the outer edge of the sidewalk, and on reaching the hole, which she did not see in the darkness, she fell into it, and sustained severe injuries. For

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Brief for appellant.

some time before the injury plaintiff had known of the hole, having previously passed along the sidewalk and by the hole, but at the time of her injury she had forgotten it. The defendant at the close of the testimony asked a peremptory instruction in its favor, but this was refused. The main issue on which instructions were granted, both to plaintiff and defendant, related to whether plaintiff exercised reasonable care at the time she was injured. The jury returned a verdict of $500 in favor of the plaintiff.

Chas. F. Engle, for appellant.

The court below should have granted the peremptory instruction asked in favor of the defendant. In refusing such peremptory instruction the court was influenced by the case of *City of Pascagoula* v. *Kirkwood,* 86 Miss., 630, s.c., 8 South., 547. A difference, however, exists between that reported case and this. In the case cited Mrs. Kirkwood would have been compelled to abandon the sidewalk, and to have gone into the street, to avoid the step-off which was in the sidewalk. In this case the only way the appellee, Mrs. Lewis, could have sustained her injury was by abandoning the traveled part of the sidewalk and, by passing along the edge of the sidewalk, thus encounter the hole. It was easily possible for the appellee to have passed safely, as there was a breadth of five feet or more of good walk at the place she was hurt. Under the circumstances we submit that the municipality was not liable. 1 Thompson on Neg., 415. We submit that the question of contributory negligence in this case was one of law. *Bridges* v. *Jackson Electric Ry. Co.,* 86 Miss., 584, s.c., 38 South., 788.

The city would not have been liable if the plaintiff had stepped off the sidewalk into the hole at a time when she was not using ordinary care and caution for her own safety. Then, why would not the rule hold true if she stepped into the hole at a time when she was not using ordinary care and caution for

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her safety? See *Meridian* v. *Stainback* (Miss.), 30 South. Rep., 607; *Vicksburg* v. *Hennesy,* 54 Miss., 396.

J. B. Stirling, and *F. M. West,* on the same side.

The testimony in this case shows that the appellee, Mrs. Lewis, had been to a reception, and was returning home with her stepson as escort, between ten and eleven o'clock at night; that the night was dark and rainy; that the streets were slippery; that the sidewalk was muddy; that it had been raining all day, and was drizzling rain that night; that the appellee was traveling her usual gait, which she says was fast in daytime and slow at night, but which her stepson testified was pretty fast that night since he had to walk rapidly to keep up with her; and that when she came to the hole in the sidewalk, she fell in. The appellee was asked, on cross-examination, as to her knowledge of the defective sidewalk, and admitted her knowledge of the same. Note her answers to the questions propounded to her:

"Q. Before this accident, about how many times did you use that sidewalk since you have been living down there? A. I cannot tell you. I have been living there about ten years. Q. Did you use that sidewalk on an average of once a day coming and once a day returning? A. Sometimes I used it more than that. Q. As much as two or three times a day? A. Yes, sir. Q. For the last ten years? A. Yes, sir. Q. Was that hole in the sidewalk when you came up town that night? A. Yes, sir, the hole had been there for a long time. Q. You had seen it? A. Yes, sir, I had seen it. Q. How long had that hole been there? A. For a couple of months. Q. You noticed it when you came up town that night? A. Yes, sir. Q. At the time you fell in, you did not see the hole? A. No, sir, I walked on the pavement, but didn't know about it and forgot about it. Q. You say you forgot about the hole? A. Yes, sir. I knew the hole was there, but I didn't just exactly know where it was that dark night."

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Brief for appellee.

Now, we respectfully submit that the foregoing is not the testimony of a prudent, careful person, who on a dark and rainy night, with streets slippery and sidewalks muddy, is careful enough to think of a hole which she knew existed, and which she should have been anxious to avoid. It would appear that appellee was not averse to falling into the hole.

While we are aware that this court in the case of *Jackson* v. *Brown* (affirmed without opinion), and *Jackson* v. *Carver,* 82 Miss., 585, 35 South., 157, and *Pascagoula* v. *Kirkwood,* 86 Miss., 630, s.c., 38 South., 547, has held that knowledge of defects by the party injured will not of itself preclude recovery by the injured party under certain conditions, yet we think that inasmuch as the appellee admits that she was not prudent, and that, with full knowledge of the circumstances, she did not use ordinary precautions for her protection, she is guilty of such contributory negligence as should preclude recovery on her part.

Claude Pintard, for appellee.

The only issue in this cause was whether the plaintiff, Mrs. Lewis, used ordinary care and prudence to prevent injury to herself. This issue was passed upon by the jury under proper instructions of the court, has been decided in favor of Mrs. Lewis, hence will not be further considered here.

As regards the contention that Mrs. Lewis was guilty of contributory negligence, the evidence did not substantiate such charge. Moreover, this question was decided in the issue mentioned above, as to the care and prudence exercised by the plaintiff.

The defective condition of the sidewalk had continued for such a length of time before the injury that the city had due knowledge of its condition. *Natchez* v. *Shields,* 74 Miss., 871, s.c., 21 South., 797; *Jackson* v. *Carver,* 82 Miss., 585, 35 South., 157.

Knowledge of the defective condition of the sidewalk by the

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plaintiff did not impose upon her the duty of exercising more than ordinary care as determined by the circumstances of the particular case, and it would be error to require the jury to find that the plaintiff was compelled to exercise extraordinary care. *Meridian* v. *McBeath,* 80 Miss., 485, s.c., 32 South., 53; *Jackson* v. *Carver,* 82 Miss., 58, 35 South., 157; *Pascagoula* v. *Kirkwood,* 86 Miss., 630, s.c., 38 South., 547; 15 Am. & Eng. Ency. Law (2d ed.), 470.

CALHOON, J., delivered the opinion of the court.

There was a hole in the sidewalk, extending into it twelve inches or more, and slanting downward and outward toward the street several feet. It had been there some months—too long for entertaining the idea that the city had no notice of it. There was no light to expose it to persons at night. Appellee knew of the existence of this hole, but on the particular occasion forgot it. On a night dark and rainy, somewhere about eleven o'clock, she, in company with her stepson, was going home along this sidewalk, and, to avoid the mud, was walking on the outer edge, and fell into it, and was seriously hurt, and got the very moderate verdict of $500 damages.

Legal principles are adaptive to situations. What are applicable to those walking in the light may not always be applied to those walking in the dark; and cities, under the circumstances and conditions of the present case, cannot avoid liability from the momentary forgetfulness of persons so using sidewalks which should be free from such traps.

Affirmed.

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Brief for appellant.

STATE OF MISSISSIPPI v. AMY FREEMAN.

[43 South., 289.]

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Arson. Two offenses in same count.*

An indictment which charges two distinct offenses, punishable by different terms of imprisonment, in the same count is demurrable.

2. SAME. *Burning of house. Personalty therein.*

A count of an indictment averring that defendant burned a house and designated personalty therein charges two offenses.

FROM the circuit court of Union county.

HON. JAMES B. BOOTHE, Judge.

Mrs. Freeman, the appellee, was indicted for arson; a demurrer was sustained to the indictment against her, and the state appealed to the supreme court.

The indictment charged that the accused "unlawfully, wilfully, feloniously and maliciously did set fire to and burn in the daytime a certain barn and about seventy-five bushels of corn in said barn; this barn and corn then and there being the property of J. L. Swain; against the peace and dignity of the state."

The demurrer was predicated of the idea that two separate and distinct offenses were charged in the same count of the indictment.

R. V. Fletcher, assistant attorney-general, for appellant.

In ordinary cases it will, of course, be admitted that it is not permissible to charge two separate and distinct offenses in the same count of an indictment. But several considerations suggest themselves as upholding this particular indictment. In the first place, this is a good indictment at common law for burning a barn. At common law arson consists in the wilful

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and malicious burning of another person's house or another person's barn *stored with hay or grain.* 1 Wharton Crim. Law, 825, 834. It will thus be seen that at common law the burning of an empty barn is not arson. The barn must contain hay or grain or other produce. Of course it is not necessary to charge that the grain or hay was actually burned, but no harm can result from so charging, especially as the indictment expressly avers that the corn burned was in the barn. Now, our statutory law defining arson does not repeal the common law crime of arson, but merely enlarges the scope of the law, making it, for example, an offense to burn an empty barn as well as one stored with grain. It is none the less true that he who burns a barn stored with grain, notwithstanding the statute, commits the common law crime of arson. And it has been well said: "It is every-day practice in the criminal courts to proceed against an offender either under a statute or at common law, as the prosecuting power elects. Even where an indictment is meant to be drawn under the statute, if it be defective as such, yet, if good at common law, it stands,—the court rejecting, as surplusage, the concluding words, "against the form of the statute." Bishop Stat. Crimes, 181. It will be noted that the present indictment under consideration does not contain the words, "contrary to the form of the statute."

In the next place, this case is affected by the fact that the barn and its contents were destroyed as the result of one single, indivisible criminal act, the whole constituting but a single crime. It is well settled that when one sets fire to a building, from the burning of which other buildings are destroyed, regardless of the number, the person criminally causing the fire is indictable for but one single act of arson. Thus, it is said, "the indictment may, without duplicity, charge in one count the burning of a number of buildings, caused by the act of the accused in setting fire to one." 3 Cyc., 997, and authorities there cited. 10 Ency. Pl. & Pr., 534.

If it be argued that a general verdict of guilty would leave

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it in doubt as to which crime had been committed, if the burning of the barn and the burning of the corn stored therein be considered as two distinct crimes, the answer is found in that line of authorities which holds that the verdict must be referred to the greater offense. *Oleson* v. *State,* 20 Wis., 60; *Roberts* v. *State,* 55 Miss., 421; *Commonwealth* v. *Miller,* 107 Pa. St., 276.

CALHOON, J., delivered the opinion of the court.

The indictment contains in one count a charge of two distinct felonies, one for burning the barn and the other for burning the corn (Code 1906, §§ 1040, 1042), with different penalties, and the circuit court correctly sustained the demurrer to it. *State* v. *Walker* (Miss.), 41 South., 8; *State* v. *Rees,* 76 Miss., 435, 22 South., 829; *Avant* v. *State,* 71 Miss., 78, 13 South., 881.

THOMAS JOHNSON v. STATE OF MISSISSIPPI.

[43 South., 435.]

CRIMINAL LAW AND PROCEDURE. *Evidence. Admissions.*

In a prosecution for homicide the statement of the decedent, being neither a part of the *res gestæ* nor a dying declaration, although made shortly after the fatal encounter and in the hearing of the defendant, is not admissible in evidence if defendant did not assent to it by silence or otherwise.

FROM the circuit court of Bolivar county.

HON. SIDNEY M. SMITH, Judge.

Johnson, the appellant, was indicted and tried for murder, was convicted of manslaughter, sentenced to the penitentiary, and appealed to the supreme court.

The admission in evidence of a statement made by Jackson, the decedent, in defendant's presence shortly after the fatal encounter and before he died, as to who was the aggressor in the

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Opinion of the court.

difficulty was the principal point in the case; state's witnesses, over objection of defendant, were permitted to testify in the trial court that immediately after the difficulty Jackson stated to them in the presence of the defendant, that defendant put the light out and fired the first shot, which statement was at the time denied by defendant, who stated, in the presence of Jackson, that Jackson had put the light out and fired the first shot. The case was once before in the supreme court. *Johnson* v. *State* (Miss.), 42 South., 166.

Harper & Potter, for appellant.

R. V. Fletcher, assistant attorney-general, for appellee.

[The briefs of counsel were lost or withdrawn from the record before it reached the Reporter.]

CALHOON, J., delivered the opinion of the court.

The statement of Jackson, just before his death, was not part of the *res gestæ,* nor a dying declaration. It was a mere narrative of past events. Its admissibility is not even plausibly suggestible, except on the basis that it was made in Johnson's presence, undenied. But he did deny its crucial statements, and so it became hearsay, pure and simple, and should not have been admitted. An examination of the authorities in both briefs shows that such may be received only when heard in silence. Then it may go to the jury with such weight as they may give to the fact of silence, in view of the situation, the condition of the accused, and all the surroundings. But here there was denial. *Brown* v. *State,* 78 Miss., 637, 29 South., 519, 84 Am. St. Rep., 641.

Reversed and remanded.

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Brief for appellant.

PLEAS WILLIAMS v. STATE OF MISSISSIPPI.

[43 South., 467.]

1. CRIMINAL LAW AND PROCEDURE. *Homicide. Instructions. Manslaughter.*

An instruction predicated of an assumption that defendant was excusable for firing two fatal shots into the body of the deceased, but seeking a conviction of manslaughter because of the firing of subsequent shots, should not be given in the absence of all evidence that the subsequent shots shortened the life of the deceased.

2. SAME.

In cases of homicide the right of self-defense should not be narrowed by instructions for the state for which there is no predicate in the evidence.

FROM the circuit court of Leake county.

HON. JAMES R. BYRD, Judge.

Williams, appellant, was indicted and tried for the murder of one Henson, convicted of manslaughter and sentenced to the penitentiary for five years. From such conviction and sentence he appealed to the supreme court.

The opinion of the court states the facts.

May, Flowers & Whitfield, and *C. S. Dobbs,* for the appellant.

The evidence shows that the character of the deceased was, to quote the language of different witnesses for the state, "very dangerous." He lived in another county than the one in which he was killed, and so far as the record discloses, had never been before seen in Leake county. Both Henson and his son were armed and were both very boisterous, disturbing those who were on the grounds and in the vicinity of the church by the promiscuous shooting of pistols and by noisy and blasphemous conduct. Bad feeling had for some time existed between Hen-

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son and the appellant growing out of the active part taken by appellant in the prosecution of Henson for a homicide committed some time before. Different persons were selected to arrest Henson, but inasmuch as he waved his knife and swore that all the men in Leake county could not arrest him, he was not taken into custody. It was only after the appellant, Williams, was notified of threats against him and his brother by the decedent, that he armed himself. The purpose of appellant in going to the church was to protect his brother if his brother should be in danger. While it is true that different friends of the appellant urged him to leave the grounds a short time before the encounter, this was merely because of the general apprehension of trouble if Henson, in his drunkenness and violent condition, should meet appellant. It is not denied that the appellant told different persons that he would not seek Henson and that appellant had no idea of meeting Henson at the place where the difficulty took place. When appellant met Henson his salutation was courteous, but Henson replied by cursing him. Different witnesses, including one witness for the state, testified that Henson made a motion as if to reach for his pistol when Williams struck his hand down. But for the fact that Henson's pistol and hand caught in his shirt while drawing it, appellant would have been shot. Henson was a very strong man, weighing almost 180 pounds. The appellant was a man of delicate appearance, weighing about 125 pounds. It cannot be denied that the appellant shot in self-defense, firing two shots very rapidly at Henson, whereupon Henson fell, and that thereupon Williams turning sideways continued to shoot and fired the last three shots.

Under the facts as above stated it was error for the court to grant the third instruction to the state. This instruction was to the effect that if the jury found that the appellant Williams armed himself in order to kill Henson and went to where Henson was, and provoked a difficulty with him to kill him, and being so armed for the purpose stated, raised a difficulty with

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Brief for appellant.

Henson, and in pursuance of such purpose killed Henson, then the appellant could not claim self-defense. In the first place, the instruction is not technically accurate, because if the jury should believe that the conduct of appellant provoked the difficulty, they were incorrectly authorized by the instruction to ignore appellant's right of self-denfense, even though they should believe from the evidence that appellant had no intention of provoking any difficulty when he procured the weapon. The instruction rendered worthless the testimony of the appellant himself as to his purpose in getting his pistol. In the second place, there was no evidence of which to predicate the instruction, for it is not shown that the appellant armed himself for the purpose of going in search of Henson and provoking a difficulty with him in order to kill him. And in any case it is a dangerous instruction, for a set of circumstances could hardly be framed to which the instruction could be profitably applied on the part of the state. Circumstances strong enough to warrant this instruction are strong enough to make it very certain that the jury will convict. Instructions like this have been more frequently condemned by this court than any other form of instruction in homicide trials. Appellant made no search for Henson. The difficulty was a mutual combat. If appellant in any way provoked the difficulty, he did it simply by going into Henson's presence,—an act insufficient to show provocation. Wharton on Homicide (3d ed.) par. 325; *Long* v. *State,* 52 Miss., 23; *Prine* v. *State,* 73 Miss., 838, s.c., 19 South., 711; *Patterson* v. *State,* 75 Miss., 670, s.c., 23 South., 647; *Lofton* v. *State,* 79 Miss., 723, s.c., 31 South., 420; *Cooper* v. *State,* 80 Miss., 175, s.c., 31 South., 579; *Rogers* v. *State,* 82 Miss., 479, s.c., 34 South., 320; *Pulpus* v. *State,* 82 Miss., 548, s.c., 34 South., 2; *Jones* v. *State,* 84 Miss., 195, s.c., 36 South., 243; *Herring* v. *State,* 87 Miss., 628, s.c., 40 South., 230; *Saffold* v. *State,* 76 Miss., 259, s.c., 24 South., 314.

The fourth instruction for the state is also erroneous, and

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Brief for appellant.

there was palpable error in granting it. There was ample evidence, as above shown, that appellant shot in self-defense, and that when Henson had partly fallen after having been shot twice and was attempting to shoot appellant, the latter shot three times. But, as we have above shown, there was no evidence that these last three shots shortened the life of the decedent. Yet this fourth instruction for the state is to the effect that if accused by these last three shots shortened the life of decedent, appellant was under such circumstances guilty of manslaughter, even though the appellant in the heat of passion fired the last three shots. There was no testimony to show that these last three shots in any way hastened decedent's death, hence no jury would be warranted in drawing the conclusion that the last three were the fatal shots. *Beasley* v. *State,* 64 Miss., 518, 8 South., 234.

O. A. Luckett, on the same side.

The third instruction granted to the state was fatally erroneous, taking into consideration the circumstances of the case and the total absence of evidence to support the instruction. We are at a loss to know upon what theory the court could have granted such an instruction taking away altogether the appellant's right to defend himself against a murderous attack. The granting of this instruction is alone sufficient to reverse the case. *Cooper* v. *State,* 80 Miss., 175, s.c., 31 South., 579; *Oliver* v. *State,* 39 Miss., 526; *Fortenbery* v. *State,* 55 Miss., 403; *Spradley* v. *State,* 80 Miss., 82, s.c., 31 South., 534.

While it is true, as contended by the learned attorney-general, that a large number of instructions were granted for the appellant, there was no instruction granted to either side which cured the vice contained in the aforesaid third instruction for the state. We must conclude that this instruction misled the jury into bringing in the verdict of manslaughter.

There was no way for the jury to reconcile this third instruc-

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tion for the state with the other instructions, especially those for appellant. Hence, as the jury had no chart nor compass to which they could look for safety as to the law of this case in their deliberations and were doubtless tossed about by every wind of doctrine, one can hardly wonder at their verdict. Where the evidence is as sharply drawn as existed in this case, it is essentially important that there should be no conflict in the instructions. *Whitfield* v. *Westbrook,* 40 Miss., 311; *Chapman* v. *Copeland,* 55 Miss., 476; *May* v. *State,* 35 Tex., 650; Enc. Pl. & Pr., 145; Hughes Crim. Law & Proc., 862.

The granting of the fourth instruction for the state was also erroneous. As shown in the brief of colleagues, this instruction was to the effect that if the jury should find from the evidence that Williams shot Henson twice, disabling him, and that while Henson was lying on the ground appellant, being in no real or apparent danger of great bodily harm, fired three more shots into Henson's body, whereby Henson's life was shortened, then the jury should find the defendant guilty of manslaughter, even though defendant, in the heat of passion, fired the last three shots. Such instruction is erroneous for several reasons: (1) it assumed a disputed fact, namely, that Henson was disabled and lying prostrate on the ground when the last three shots were fired; (2) that appellant was at the time in no danger real or apparent; (3) and that there was a measurable interval of time between the first two and the last three shots; and (4) that these last three shots shortened the life of decedent. These assumptions of fact being unwarranted from the evidence, made the granting of the instruction manifest error. *Cooper* v. *State,* 80 Miss., 176, s.c., 31 South., 579; *Bell* v. *State,* 89 Miss., 810, 42 South., 542; *Bonds* v. *People,* 39 Ill., 26; *Hatch* v. *Garza,* 20 Ark., 171.

There were no elements of murder in the case, and it was a close case of facts whether the defendant was guilty of manslaughter or acted in necessary self-defense.

An additional reason why this fourth instruction was er-

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Brief for appellant.

roneous is that the court nowhere defines to the jury what were the essential facts to constitute manslaughter under our statute, hence it was a leap in the dark for twelve ordinary farmers, such as were the jury, to tell just exactly what did or did not constitute manslaughter. *State* v. *Sloan,* 47 Mo., 604; *Payne* v. *Comm.,* 1 Met. (Ky.), 370. See also the able dissenting opinion of WHITFIELD, C. J., in the *Lipscomb case,* 75 Miss., 599, s.c., 23 South., 210, which, in our opinion, is the law.

Byrd, Wilson & Richardson, and *Presley Groves,* on the same side.

The fourth instruction for the state was, under the circumstances, erroneous. There was evidence that the appellant shot Henson in self-defense. It cannot be denied that Henson was drunk, and had been giving trouble practically all the day, and steps had been taken to arrest him, but without avail. Although it may be that the appellant shot Henson three times after Henson had fallen, there was no evidence that these three shots shortened Henson's life. The court will see that the language of this instruction was a palpable request to the jury for some sort of conviction. The instruction authorized the jury to find a verdict of manslaughter, based on the firing of the last three shots, although the entire five shots, to-wit, these shots and the two preceding, might have been fired in rapid succession. The jury were not required to find any interval between the first two and the last three shots, nor that appellant had time to see that the last three shots were unnecessary. Nor were they required to find that there was any interval at all, much less, such interval as would enable the appellant to regain control of himself, after escaping from the imminent danger. With a rapidly firing pistol, the five shots could have been made in a very short time, possibly in two or three seconds. No witnesses testified that there was any interval between the first two and the last three shots. Yet, the jury were authorized to find the verdict of manslaughter, even though they

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Brief for appellee.

should believe there was no perceptible interval at all, and that the shots were fired in rapid succession, and all of them before Henson fell to the ground. The instruction was improper, also, because there was no testimony to show that the last three shots caused, or in any way hastened the death. It is impossible to say which of the five shots caused the death. The instruction comes within the condemnation of this court, as cited in *Godwin* v. *State,* 73 Miss., 873, s.c., 19 South., 712.

The third instruction for the state is also erroneous, for the reasons stated in the briefs of our colleagues.

R. V. Fletcher, attorney-general, for the appellee.

It can hardly be contended, as an abstract proposition of law, that the fourth instruction for the state was erroneous. This instruction charged the jury that if they believed beyond reasonable doubt that the appellant shot Henson twice, and that when Henson was disabled and had fallen to the ground, appellant, being in no real or apparent danger, fired three more shots into the prostrate body of Henson, and these last three shots shortened the life of Henson, then the jury should find the defendant guilty of manslaughter, even though appellant fired these last three shots in the heat of passion. The proof shows almost without dispute that a short interval elapsed between the first two and the last three shots. One witness says that after the first two shots the appellant advanced and stopped before shooting again. Other witnesses say that he stepped aside after the first two shots, hence there is ample evidence that there was a pause in the midst of the firing. Many witnesses say that after the first two shots were fired, Henson had fallen, and was making no effort to do anything. Appellant seeks to justify these last three shots by showing that, when he fired the third shot, Henson was still attempting to use his pistol, and it is contended by opposing counsel that there is no proof that the last three shots were the cause of or hastened the death of Henson. Yet several witnesses for the

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state testify that although Henson was struck by the first two shots he did not immediately fall prostrate but was resting on his hip and elbow, and fell dead only after the fifth shot. It is evident from what these witnesses say that the death did not ensue until after the fifth shot. This instruction accordingly should not reverse the case if this court finds that there was proof from which the jury might conclude that the last three were the fatal shots.

Opposing counsel contend that the third instruction for the state is also erroneous. This instruction is to the effect that if the jury should find that appellant armed himself with a pistol for the purpose of killing Henson, and went to Henson and provoked the difficulty with him in order to take his life, and did kill him, then appellant cannot justify his action on the ground of self-defense. It cannot be denied that, as an abstract proposition of law, this instruction is correct. It was shown in evidence that the appellant heard that Henson was making threats against him, and that appellant was advised by friends to stay away from the church that afternoon; that appellant armed himself at his home; and he himself frankly admits that he did so in expectation of having a difficulty with Henson. Friends attempted to persuade him not to go where he might find Henson, but he replied that he wanted to see the color of Henson's eyes. It is undisputed that he deliberately left the traveled pathway and went fifteen or twenty feet out of his way to where Henson was eating his dinner in order to accost him. Seven disinterested witnesses testified that appellant was the aggressor in the difficulty. Hence it is submitted that there was sufficient showing of facts to uphold the instruction.

But even if either of the two instructions by itself be considered erroneous, it must be kept in mind that there were twenty-nine liberal instructions granted for the appellant advising the jury of his many different rights, for instance: the right of self-defense, the right to bear arms, the right to arm

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himself, the right to go to the church, and to travel any route he desired.

Argued orally by *J. N. Flowers,* and *A. M. Byrd,* for appellant, and by *R. V. Fletcher,* attorney-general, for appellee.

CALHOON, J., delivered the opinion of the court.

Williams was indicted for murder and convicted of manslaughter. It is fairly to be deduced from this record that the man he killed was drunk and that Williams was sober; that the deceased was much the more powerful man and in robust health; that Williams was sober, but weak, and a victim of tuberculosis. The occasion was an annual gathering at the church, where there was to be baptizing and then a foot-washing according to the practices of that particular congregation. At such events it appears that the whole neighborhood gathered for miles. The deceased lived in another county and had never been seen there before. His character, as shown by many witnesses, was that of being quite violent, and, in the language of some of the state witnesses, "very dangerous." On that particular Sunday he appeared there and was armed, and had his son with him, who was also armed. He and his following were very boisterous, and disturbed those on the grounds by the promiscuous shooting of pistols and violent, noisy, and blasphemous conduct. The deceased had a grudge against appellant and against appellant's brother, arising out of some conduct of theirs in the prosecution of deceased for shooting a man some time before. The conduct of deceased was such on or near the church grounds that thirty men were selected to arrest him, but they were afraid to do it; he waving a knife and swearing that all the men in Leake county could not arrest him. He had been making threats against Williams and his brother, and was inquiring for them. Because of his very dangerous character, Williams' friends induced him to go home, which he did; his home being about two hundred and fifty yards from the church.

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He was in the habit of going to and from the church by following a by-path through the woods, which made the distance nearer by one-fourth to one-half. Williams went, being then unarmed; but, hearing a renewal of gun shooting or pistol shooting towards the church, he became uneasy about the safety of his brother, who, as he thought, was at the church. Thereupon he got his pistol, and put on a "jumper" coat, and took that path to go to the church, in order to protect his brother, if in danger. In following that path, and near the church, he came to a place where there was a wagon, at which deceased was standing. As testified to by one of the witnesses for the state, there was general apprehension of trouble if Henson, the deceased, should see Williams, which explains the fact that the friends of Williams induced him to leave the grounds a short time before the encounter. It appears to be also certain that Williams had told his friends that he would not seek Henson, and, if he saw him, would speak to him in a friendly way. It is also clear that Williams had no idea that he would find Henson on the path which he took from his home to the church. It appears that when Williams came up to Henson, and shook hands with him, and asked him, "How are you?" Henson responded with a blasphemous salutation and the statement "I am well enough for you." This appears from a state witness, who also says that Henson made the first motion with his hand up, presumably, of course, from the statement of many witnesses, to reach for his pistol, when Williams struck his hand down. Several witnesses testify that Henson got his pistol out first, but he caught it in his shirt with his thumb in drawing it. Others testify that the pistols were produced about the same time, but Williams got the first shot. One of the state witnesses testifies that Henson cursed Williams and "raised his hand to get his gun." Certain it is that Williams fired very rapidly two shots, when Henson fell on his hands or elbows and knees, and then it appears from several witnesses, and among them some for the state, who say that when Henson fell on his knees and elbows he

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was trying to shoot his pistol at Williams from the ground, when it was called by by-standers, "Look out, Pleas!" when Williams shot him three times again. This is testified to by witnesses for the state, as well as for the defense. It will be seen that Williams fired two shots very rapidly at Henson standing, when Henson fell, when there was a pause, and Williams turned sideways and then made the last three shots. As a matter of fact it is questionable whether the pause was more than a second.

The foregoing is a general, but fair, résumé of the prominent features in this case, whereupon the court gave the following instruction for the state: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that Williams shot Henson two shots, and that Henson was then disabled and on the ground, and while Henson was so disabled and Williams in no danger, real or apparent, of losing his life or having some great bodily harm done him, fired three more shots into the body of Henson, and that such last shooting shortened the life of Henson, then the jury should find the defendant guilty of manslaughter, and that even though Williams in the heat of passion fired the last shots." This action of the court was erroneous. In situations like this the action of the human mind or the impulses of the human heart cannot be measured by half seconds, and the state cannot make a bonfire with no other fuel than a splinter like this. Besides, there is no sort of proof that the last three shots shortened Henson's life. On the contrary, we judge from the testimony that the first two shots were fatal, and that Henson did not live more, perhaps, than three to five seconds, and no jury would be warranted in drawing the conclusion that the last three shots shortened his life. *Beasley* v. *State,* 64 Miss., 518, 8 South., 234.

It was also error to grant this instruction, which was given at the instance of the state, viz.: "The court instructs the jury that if they believe beyond a reasonable doubt from the evidence

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Statement of the case.

in this case that Pleas Williams armed himself with the pistol for the purpose of killing John Henson, and went to where John Henson was and provoked the difficulty with him in order to get to kill him, and so armed for the purpose of killing him, raised the difficulty with John Henson, and in pursuance of such purpose killed John Henson, then the defendant cannot justify on the ground of self-defense." There was no evidence whatever before the jury that Williams armed himself with the pistol for the purpose of killing Henson, or that he knew the place where Henson was, or that he went to him and provoked the difficulty with him.

It follows that this case must be reversed and remanded.

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WILLIAM C. EASTLAND ET AL. v. YAZOO DELTA LUMBER COMPANY.

[43 South., 956.]

TAXATION. *Tax sale. Unconstitutional law. Code* 1880, § 539. *Code* 1892, § 2735. *Code* 1906, § 3095. *Statute of limitations.*

A tax sale based upon a pretended assessment, made under a statute violative of the constitution, is not aided by the three years' statute of limitations, Code 1880, § 539, Code 1892, § 2735, Code 1906, § 3095.

FROM the chancery court of Sunflower county.

HON. PERCY BELL, chancellor.

The Lumber company, the appellee, was complainant in the court below; Eastland and others, the appellants, were defendants there. From a decree in complainant's favor the defendants appealed to the supreme court. The object of the suit was to cancel appellant's claim to lands as a cloud upon appellee's title thereto.

The appellants claimed the land under a tax sale made March 7, 1892, fortified by actual occupation of the premises

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Brief for appellants.

for a period of more than three years, but less than ten. The question presented was whether the actual occupation, under the tax title in question, for three years, had the effect of vesting good title in appellants; the tax sale having been made for default in payment of taxes levied under the assessment roll of 1889, under the act of 1888 known as the "Madison act."

Marvin H. Brown, and *Joe H. Mize,* for appellants.

Sections 539, Code 1880, and 2735, Code 1892, were enacted to cover just such tax sales as this; sales where the land owners have been grossly negligent in every respect; where they have never made the least attempt to do any act in connection with the ownership of the lands so sold, for a period of years.

The act of legislature requiring the tax assessor to do certain duties in connection with the assessments made by him being void because of its unconstitutionality rendered the tax sale void, there is no question as to that, but the statutes invoked by appellants were enacted to cure such errors and defects.

The deliquency was real and not apparent; appellees do not claim that they ever paid any taxes or made any proof of payment; no steps to redeem were taken by them; absolutely nothing was done whereby the state's vendee, or the state, could ascertain whether appellees were at all interested in the land formerly owned by them.

In the case of *Hawkins* v. *Mangum,* 78 Miss., 97, s.c., 28 South., 872, the point of actual occupation for three years, after the period of redemption has passed, as prescribed by § 2735 of Code of 1892, was not made, or presented, and likewise in *Coffee* v. *Coleman,* 85 Miss., 14, s.c., 37 South., 499, and in *Scarborough* v. *Elmer,* 87 Miss., 508, s.c., 40 South., 69; therefore these cases are not in point.

It will not be denied that the state had the right to tax the land in controversy, and the fact that the legislature of the

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state required the tax assessor to do an unconstitutional act should not prevent the curative statutes, here invoked, from saving appellants in this appeal and litigation.

In *McLemore* v. *Scales,* 68 Miss., 47, s.c., 8 South., 844, the learned judge, in speaking of the statutes here invoked, said: "It is a statute of limitations applicable alike to all sales of lands for taxes, and precluding any controversy, whatever may be the ground for assailing the title claimed by virtue of the sale. It is one of the several provisions of law designed to secure the rights of purchasers at sales for taxes, and thereby accomplish the double purpose to constrain owners of land to pay the taxes, and induce individuals to buy all land sold for taxes, so that the state shall not become the buyer. It should have effect according to its purpose."

In *Carlisle* v. *Yoder,* 69 Miss., 384, s.c., 12 South., 255, the learned judge went so far as to say: "An actual payment of the landowner of the taxes for which the sale was made would not serve to defeat the title of the occupant of land claimed under a tax sale, who has held possession for the period prescribed by the statute. The title becomes perfect by lapse of time, whatever its original infirmity may have been." The case brought to your notice is much stronger, no payment having been attempted by the owners.

In *Patterson* v. *Durfey,* 68 Miss., 779, s.c., 9 South., 354, the learned judge said: "A taxpayer may be in fact really delinquent, or he may be apparently delinquent. In either case, so far as the public can know, the delinquency is the same, and if not cleared up by proper action on the part of the apparent delinquent, the results may be the same, etc." This case is much stronger because the delinquent is real.

If we understand the ruling of this court upon the last cases cited for your consideration, viz.: *Carlisle* v. *Yoder,* 69 Miss., 384, s.c., 12 South., 255, and *Patterson* v. *Durfey,* 68 Miss., 779, s.c., 9 South., 354, they were overruled only that the statute invoked applies to lands actually subject to taxation and

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therefore subject to sale for delinquency; and nowhere do we find appellees contending that the land in controversy was not liable to taxation, and taxable land, in the purview of the statute here invoked.

Sections 539 of the Code of 1880 and 2735 of the Code of 1892 bar any recovery by appellees "because of any defect in the sale of the land for taxes, or in any precedent step to the sale, etc." Under this statute it matters not whether the defect or precedent step be credited to the legislature, the tax assessor or the tax collector; the purpose is to make good the errors of all parties who serve to regulate or carry out the revenue systems of the state.

Section 3095 of the Code of 1906, which says that "This section shall not apply when the sale is absolutely void and not merely irregular and voidable" does not apply to this case, because the sale was not made when the statute was in force and was made under or rather during the life of the statutes pleaded in bar of appellee's right to recovery. This section and statute was passed some months after appellees filed their suit against appellants, and is not in our opinion capable of retroaction.

For the first time, we say, the statute of limitations which is prescribed in §§ 539 of Code of 1880 and 2735 of the Code of 1892 is invoked to support a title vested by virtue of a tax sale made under and by virtue of the assessment made in accordance with the unconstitutional Madison act, and appellants plead this statute and cite, in addition to the cases already cited and from which appellants have quoted the law, the following cases, viz.: *Pipes* v. *Farrar,* 64 Miss., 514, s.c., 1 South., 740, and *Brougher* v. *Stone,* 72 Miss., 647, s.c., 17 South., 509.

Appellants cite further *Hoskins* v. *Illinois, etc., R. R. Co.,* 78 Miss., 768, s.c., 29 South., 518, in which the learned judge who delivered the opinion said:—

"Section 2735 applies to sales of lands only that are taxable and salable, and in which there is some defect in the proceed-

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ings relating to the assessment or sale, etc." Here the defect is in the assessment, it having been made in accordance with a statute enacted by the legislature, and afterwards adjudged to be unconstitutional. The fault is not with the tax assessor who discharged his duty under the statutes relating thereto, and likewise the fault is not with the tax collector who made the sale in accordance with the then existing law; the legislature was at fault in passing the unconstitutional Madison act.

In *Hoskins* v. *Illinois, etc., R. R. Co.,* cited above, the learned judge said further in explanation of the decision by the supreme court: "We place our decision upon the ground that the property is exempt from taxation by law, and all attempts to subject it to taxation are in fraud or in violation of law, are the acts of wrongdoers, and cannot give color for divesting the title of the owner for three years' actual occupation, under § 2735, Code 1892.

But this land in controversy was taxable and therefore subject to sale for delinquency; no exemption is pleaded or claimed by appellees.

Baker & Moody, for appellee.

[Counsel for appellee did not file a brief in this case but referred the court to their brief in another case, not now accessible to the Reporter, for a discussion of the questions here presented.]

WHITFIELD, C. J., delivered the opinion of the court.

The sale for taxes under review in this case was absolutely void, for the reason that the assessment was made under the Madison act, which act we have three times declared to be unconstitutional and void. See *Hawkins* v. *Mangum,* 78 Miss., 97, 28 South., 872; *Coffee* v. *Coleman,* 85 Miss., 14, 37 South., 499; *Scarborough* v. *Elmer,* 87 Miss., 508, 40 South., 69. In the first-named case this court speaking through Mr. Justice CALHOON, said, in response to the suggestion of error which insisted that the act of 1890 (Laws 1890, p. 19 *et seq.,* c. 6)

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cured the sale, that that act "had no sort of application to a case where there was no assessment, that the act had and could have no reference to an assessment absolutely void because of an unconstitutional law," and finally said, with great clearness and emphasis: "This act cannot cure an unconstitutional law. It cannot apply, even if it could then be efficacious, to an assessment which was no assessment at all"—citing a long array of authorities, amongst them *Dingey* v. *Paxton,* 60 Miss., 1038, and *Thibodeaux* v. *State,* 69 Miss., 683, 13 South., 352. For the very same reason precisely § 539 of the Code of 1880 can have no application in the case at bar; for we have the identical assessment under review here that was under review in *Hawkins* v. *Mangum* and the two other cases referred to. No act of limitations passed by the legislature can have any application whatever to a tax sale void because the assessment was made under an act of the legislature which was itself unconstitutional.

All that is said in the brief about the right of the state to tax the land, and about any supposed distinction between the case at bar, whch is the *Mangum case* over, and the case of *Hoskins* v. *I. C. R. R. Co.,* 78 Miss., 768, 29 South., 518, 84 Am. St. Rep., 644, is quite beside the mark. We have, in the case of *Kennedy* v. *Sanders, post,* s.c., 43 South., 913, pointed out the principle of all these cases, and content ourselves now with the reference to the reasoning on this subject in that case. There can be no liability to taxation, no delinquency, no taxes due, and therefore no sale for taxes, where the land has never been assessed; and that is precisely what we held was the case in *Hawkins* v. *Mangum,* the counterpart of this case. It is certainly fortunate that the legislature, in adopting § 3095 of the Code of 1906, has declared that that section shall not apply when the sale is absolutely void; fortunate as the legislative declaration that the intent of the legislature never had been as misinterpreted in *Carlisle* v. *Yoder,* 69 Miss., 384, 12 South., 255; *Patterson* v. *Durfey,* 68 Miss., 779, 9 South., 354; and

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Brougher v. *Stone,* 72 Miss., 647, 17 South., 509, that such a statute of limitations should cure a pretended sale for taxes when there never had been in truth and in fact any power to sell for taxes at all. That legislative provision was merely declaratory of what this court has already announced to have been the legislative intent in § 539 of the Code of 1880 and the other related statues of limitation.

Affirmed, and remanded for an accounting.

AMANDA J. WARREN *v.* OCTAVIA DAVIS ET AL.

[43 South., 604.]

HOMESTEAD. *Inheritance. Right of widow. Equitable title. Code* 1871, § 1956.

Under Code 1871, § 1956, providing that property exempted by law from sale under execution shall on the death of the owner descend to his widow and children as tenants in common, the widow and children of the equitable owner of lands constituting his homestead at his death jointly and equally inherited the same in fee simple.

FROM the chancery court of Sunflower county.

HON. PERCY BELL, chancellor.

Mrs. Davis, and others, the appellees, were complainants in the court below; Mrs. Warren, the appellant, was defendant there. From a decree in favor of the complainants, the defendant appealed to the supreme court.

In 1868 the land in controversy was sold in satisfaction of a mortgage, and the late Colonel W. L. Nugent became the purchaser as "the agent and attorney in fact for one John R. King." In 1870, Nugent, as agent, conveyed the land to Annie King, the wife of John R. King; the deed reciting a consideration of $10. King had several children by former marriages, but none by his wife Annie; he died intestate June 4, 1876,

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Statement of the case.

leaving surviving him his children by former marriages and their decendants, through whom complainants claim title. He also left surviving his wife, Annie King, who afterwards married one Anderson; and it is through her that appellant (defendant below) claims title as devisee in a will which devised all her "real and personal estate." In 1878 one of the children of King filed a petition in the chancery court to set aside to said Annie King her dower in the land, which was done; the widow being given the land in controversy, and she continued to reside on it until her death in 1904. The balance of the land was turned over to the children of King, who sold and disposed of it.

The contention of complainants is that, though the legal title to the land was in Nugent as agent and attorney for King, an implied trust had been created, and the equitable title remained in King, who treated the land as his own until the time of his death; that the deed to Annie King by Nugent as agent did not vest in her the equitable title, since it was for a nominal consideration, and she therefore became a purchaser without consideration with notice of the equity; and, further, since there was no written request made by King of Nugent to transfer the equitable title, even if Nugent executed the conveyance at the request of King, it was within the statute of frauds and void; that Annie King occupied the same position as Nugent, and that the trust could be enforced against her to the same extent as against him, which fact had been recognized by her, and she had acquiesced in the proceedings by which a dower interest was set apart to her; that the interest was not such as could be devised, but on her death reverted to the children of King; that, having acquiesced in the dower proceedings, she was estopped from setting up a claim to a fee-simple title to any part of the land. Defendant (appellant here) contended that Annie King acquired fee-simple title by the conveyance from Nugent to her, and that she was not divested of this title by the dower proceedings, because the court

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Brief for appellant.

in which they were had was without jurisdiction to pass on land titles adverse to the title of the deceased, and that in any event she was entitled under Code 1871, § 1956, to a child's part in the homestead in fee simple, and that, since the property in controversy was occupied by King as a homestead at the time of his death, she acquired a child's part of it in fee simple, and that this interest was capable of devise. The chancellor in his opinion sustained the contentions of the complainants throughout.

Johnson & Neill, for appellant.

John R. King died in July, 1876; the rights of the widow and heirs in his estate are governed by the Code of 1871. The decree in this case allows the widow only a life estate, a dower. Under Code 1871, § 1956, she was entitled to a child's part of the homestead in fee simple.

This section was construed in *Hickman* v. *Ruff,* 55 Miss., 549. As between the widow and heirs of King the value of the eighty acres of land is not in question. *Moody* v. *Moody,* 86 Miss., 323, s.c., 38 South., 322.

Under Code 1871, § 1281, the dower of the widow comprehended the dwelling house occupied by the husband at the time of his death.

After the death of John R. King, a proceeding was commenced by one of his daughters to set off dower to his widow, Annie King. The widow made no resistance to this proceeding, and the land in controversy was allotted to her as dower. It is contended for the appellees in this case that this proceeding is an adjudication against Annie King, that the title was in her husband, and not in herself; and if not an adjudication against her, that she is estopped by these proceedings.

The only question settled by an apportionment of dower was the seizure, marriage and death. The title was not involved. *Jiggetts* v. *Bennett,* 31 Miss., 612; *Jiggetts* v. *Jiggetts,* 40 Miss., 726; *Gould* v. *Luckett,* 47 Miss., 118.

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Brief for appellees.

Baker & Moody on same side.

If this suit had been instituted against Nugent, he would not be heard to say that he did not purchase the land as the agent and attorney for John R. King.

If an expressed trust was created by the deed to Nugent, the deed executed by him to Annie King was without authority and void. 28 Am. & Eng. Ency. L. (2d ed.), 992, *Maxwell* v. *Barringer,* 28 Am. St. Rep., 668, and *Goad* v. *Montgomery,* 63 Am. St. Rep., 145.

It is manifest that a trust was created. When Nugent became the purchaser of the land as the agent and attorney of John R. King, and a deed was executed to him in that capacity, an implied trust, to say the least of it, was created. Counsel seem to be under the impression that in order for there to be an implied trust it was necessary that the money, with which the property was purchased, should have been furnished by King, and that we have failed to show that this was done. When one employs an attorney to purchase land for him, a trust relation at that instant exists, and it is immaterial whether the purchase money was paid by the attorney or the client. The attorney surely could not have purchased the property and set up the title, so acquired, as against his client. The most which he could do would be to recover the amount advanced by him to purchase the land, and the burden would be on him to show that he did this. *Campbell* v. *Lewis,* 56 Miss., 76; *Johnson* v. *Outlaw,* 56 Miss., 541.

J. T. Manion, for appellees.

The probate court had jurisdiction of the subject matter, and brought in by proper process all the heirs and the widow, Mrs. Annie King. The jurisdictional facts necessary to the exercise of the power to assign dower do not have to affirmatively appear, of record, but the jurisdiction having been granted by the constitution the decree itself is sufficient to show that everything that was necessary to justify a decree was be-

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fore the court. In the case at bar, the presumption is, that there was sufficient evidence before the court to show that John R. King died, seized and possessed of the lands in question, or that the same was admitted in the pleadings. Mrs. Annie King's right to lands in question was forever closed when she was brought into court, required to answer the petition of Octavia Davis, alleging that John R. King died, seized and possessed of the lands in question and that they descended to his heirs, and asking that dower be assigned to her of the lands of John R. King, and she failed to respond, thereby assenting to the allegations of the petition.

In a proceeding for dower where the land is treated by the parties and recognized by the court as belonging to the estate of the deceased husband and the title as being in his heirs the judgment rendered is conclusive between the parties and those claiming under them, and hence he will in such case be estopped from setting up title to the land embraced in the proceeding. *Sigmon* v. *Hawn,* 86 N. Car., 310; *Stancell,* 76 N. Car., 369.

WHITFIELD, C. J., delivered the opinion of the court.

The learned chancellor was correct in all respect save one. The equitable title to the property was, as he correctly held, in John R. King at his death in 1876, and under Rev. Code 1871, § 1956, as construed in *Hickman* v. *Ruff,* 55 Miss., 549, the widow was entitled to a child's part in fee simple in the exempt homestead. She was not entitled to anything else.

For error indicated, the decree is reversed, and the cause remanded, for decree in accordance with this opinion.

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Brief for appellants.

WILLIAM E. STEVENSON ET AL. *v.* JOHN A. REED.

[43 South., 433.]

TAXATION. *Tax sale. Method. Evidence. Testimony of officer. Official acts. Code* 1892, § 3813.

Under Code 1892, § 3813, requiring country lands sold for taxes to be offered in forty acre tracts:—

(*a*) A sale of an undivided one-half interest in an eighty acre tract is illegal, and

(*b*) It is competent to prove how the sale was conducted by the tax collector who made it.

FROM the chancery court of Sunflower county.

HON. PERCY BELL, chancellor.

Reed, the appellee, was the complainant in the court below; Stevenson and others, the appellants, were defendants there. The object of the suit was to comfirm a tax title to lands. It was defended on the ground that the land was not sold in forty-acre tracts as required by law (Code 1892, § 3813), and in support of this contention defendants caused the tax collector who made the sale to be introduced as a witness, who, over the objection of complainant to his competency as a witness, testified that he sold an undivided one-half interest in an eighty-acre tract at each offering, etc. From a decree in favor of complainant the defendants appealed to the supreme court.

Johnson & Neill, for appellants.

The principal authority relied on for the suppression of the testimony of Miller, is what we consider an obiter in the case of *Clevenger* v. *Mixon,* 74 Miss., 74, s.c., 20 South., 148; the only sentences in the opinion which touch the question we are now discussing follow:—

"The chancellor sustained the exception of the defendants to

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the answers of this witness to the fourth, fixth and sixth interrogatories. The exceptions do not appear in the record. We suppose, however, they were grounded upon the incompetency of the officer as a witness to testify so as to impeach his own official conduct, but if the testimony had been admitted, it was wholly insufficient to overthrow the *prima facie* case made by the deed."

It cannot be seriously contended that this is an authority that the officer cannot be heard to testify as to the manner in which he made the sale. So far as we have been able to find there had never been an exhaustive discussion of the point now under consideration by the supreme court of this state. In the case of *Wood* v. *American, etc., Co.,* 7 How. (Miss.), 632, one of the questions was the competency, as a witness, of a justice of the peace to give testimony to impeach a notarial record made by him. The court through Chief Justice SHARKEY says:

"A justice of the peace probably could not be allowed to falsify his own certificate, for this would be to show his own malconduct, and to deny an accredited act when he is called upon to explain the manner in which his certificate was given, the question is different."

So it seems under this authority an officer is a competent witness to explain the manner in which he discharges his official duty, though the explanation may result in invalidating the official act.

There are two cases, *Brothers* v. *Beck,* 75 Miss., 482, s.c., 22 South., 944, and *Mullins* v. *Shaw,* 77 Miss., 900, s.c., 27 South., 602, in which one of the questions was the competency of the assessor to testify that he did not return the assessment roll in the time required by law. In these cases tax titles were attacked which rested on the assessment of 1883; in both cases McCauley, the deputy assessor, who made the assessment and returned the roll, was introduced to show that the roll was not returned to the chancery clerk's office by the first Monday in

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Brief for appellee.

July, according to the statute. We are not advised whether the testimony was objected to in the first case and exception taken, but a motion was made in the second one to suppress the deposition, and the competency of McCauley was one of the points in the case on appeal. The supreme court did not pass upon the competency of this witness in either case, although it commented on the testimony.

We are quite sure that the doctrine that a public officer cannot testify to the truth when the truth invalidates his official acts is not well founded either in reason or authoritative precedent. On this point we call the attention of the court to 1 Wigmore on Evidence, secs. 529, 530, 531.

Chapman & Everett, for appellee.

It is manifest that the land was assessed as the W. ½ of the N. E. ¼ and the E. ½ of the S. E. ¼ of sec. 12, T. 18, R. 3 W., and the taxes on an undivided half interest in this land had been paid by the rightful owner, and there was left an undivided half interest on which the taxes had not been paid. Section 3813 of the Code of 1892 clearly provides the manner in which land sold for taxes must be offered for sale. It provides that the tax collector, in selling lands for taxes, shall offer forty acres, and, if the first parcel sold does not produce the amount due, then he shall offer another similar subdivision. The statute is mandatory; and a tract of land containing forty acres or more, when sold for its taxes, cannot be legally sold by the tax collector in less subdivisions than forty acres. It matters not whether land sold for taxes be a certain sixteenth of a section which is forty acres, or, whether it be an undivided one-half interest in a certain eighth of section, which is forty acres. If there be as much as forty acres in the tract to be sold, it must be offered at one time, regardless of the value of the property so sold or offered for sale.

The tax deed together with the "List of land sold to the state or to individuals" is *prima facie* evidence that the sale was

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valid. See § 1806, Code 1892. Not only is it *prima facie* evidence that all of the preliminaries necessary to its validity were done; and the presumption of a legal assessment and a legal sale is raised and stands out as truth until that presumption is overthrown by the defendant, and the burden of proof is on him. Code 1892, § 1806; *Virden* v. *Bowers,* 55 Miss., 1; *Bell* v. *Gordon,* 55 Miss., 50; *Climer* v. *Cameron,* 55 Miss., 596.

The tax collector could not legally have sold the land in question in any other manner than that in which he did sell it. The statute does not say that enough of a piece of land shall be sold to pay the taxes due, but it says that forty acres shall be sold, and this is what the tax collector did.

The law creates a presumption that the assessment and sale were in all things regular, legal, and valid; and in order to overcome this presumption and to show that the assessment and sale were illegal and invalid the defendant must show this by competent testimony, and in order to show this he will have to show it by some other witness than the tax collector who made the sale. *Mixon* v. *Clevenger,* 74 Miss., 67, s.c., 20 South., 148.

WHITFIELD, C. J., delivered the opinion of the court.

The taxes were shown to have been paid by satisfactory evidence. The method of sale was illegal. The sheriff should have sold forty acres at a time. His testimony was simply explanatory of how the sale was conducted. It did not fall within the rule that an officer may not impeach his official acts. See 1 Wigmore on Evidence, secs. 529, 530, 531. See, also, *Mullins* v. *Shaw,* 77 Miss., 900, 27 South., 602, 28 South., 958; *Mixon* v. *Clevenger,* 74 Miss., 67, 20 South., 148, is no authority to the contrary. A distinction is sought to be drawn by Chief Justice SHARKEY in *Woods* v. *American Life Insurance & Trust Co.,* 7 How., 632, where speaking of the competency of the testimony of a justice of the peace as to a notarial record made by him, he says: "A justice of the peace prob-

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Statement of the case.

ably could not be allowed to falsify his own certificate for this would be to show his own malconduct and to deny an accredited act; but, when he is only called upon to explain the manner in which his certificate is given, the question is different." That distinction, if found, would be enough, since all that the tax collector did was to explain the manner in which the sale was conducted. But it was competent on broader grounds, as clearly shown by Wigmore, *supra*.

Reversed, and bill dismissed.

SILVER CREEK NAVIGATION & IMPROVEMENT COMPANY *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[43 South., 478.]

NAVIGABLE WATERS. *Obstructions. Equitable remedies. Pleadings.*

A bill in equity to compel the removal of obstructions to the navigation of a stream created by a railroad company is not demurrable if it show that complainant has a special statutory exclusive right for a term of years to navigate the stream and that the defendant has constructed railroad bridges across it in such a way as to needlessly obstruct navigation and had thereby interfered with complainant's enjoyment of its exclusive right.

FROM the chancery court of Yazoo county.

HON. G. GARLAND LYELL, Chancellor.

The appellant, Silver Creek Navigation & Improvement Company, a corporation, was complainant in the court below; the Yazoo & Mississippi Valley Railroad Company, appellee, was defendant there. From a decree sustaining the defendant's demurrer to the bill of complaint and dismissing the bill the complainant appealed to the supreme court.

The complainant's bill showed that it was incorporated in 1884, and by the legislature empowered (Laws of 1884, p. 864, *et seq.*), to deepen and widen the channel of Silver creek in

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Statement of the case.

Yazoo county and to construct locks and dams so as to make the stream navigable; that it was given the sole and exclusive right to navigate the parts of the stream improved, for fifty years; that, after operating for many years, one end of a dike, constructed to increase the volume of water, gave way; that when the means to repair the dike and put the stream again in navigable condition were at hand, complainant was deterred from so doing by the fact that the defendant railroad company had built a railroad across the creek and constructed a bridge in such manner that it was impossible for the complainant to navigate any kind of water craft in the stream; and that if the defendant company should be permitted to maintain its road as its bridges are constructed in several places across the stream, the franchise and water right given to complainant by the legislature would be virtually annulled and its property rights invaded in violation of the constitution of the state. The bill further averred that the legislature, in empowering complainant to deepen and widen the stream had declared the creek a navigable stream; and that it would be easy for the defendant railroad company to place gateways and sluices and drawbridges so as to subserve the rights of the complainant without interfering with the railroad company's operation of its road. The opinion further states the allegations of the bill.

The railroad company demurred because the bill failed to show that Silver creek was a navigable stream at the time the suit was begun; because it failed to show that the complainant had complied with its charter requirements; and because the bill was premature in that the dike had not been restored, and whether or not the bridges of defendant would affect the navigation of the stream could not be positively known until the dike was rebuilt.

It was contended by appellant that "the decree rendered by the chancery court dismissing the bill is violative of art. 1, § 10, of the federal constitution, providing that "no state

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Brief for appellant.

shall make or pass any law impairing the obligation of contracts," and also of the fourteenth amendment to the federal constitution, providing that "no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States . . . or deny to any person within its jurisdiction the equal protection of the law."

Hudson & Fox, for appellant.

The first ground in the demurrer is simply an averment that is not supported by the frank declaration of the bill. The bill alleges that the water is not as navigable now as it was when the levee was in good repair and that it is not in condition to float as large crafts as it did prior to the crevasse in the dike, that it is navigable for small crafts, but is not as much so as before. The whole frame-work of the bill and all of its statements convey the unmistakable belief that the stream of water is navigable now for small boats but not as much so as the appellant would like to use in order that more profit might be derived from its business. The legislature of Mississippi by the act aforesaid in granting its rights to this appellant declared this stream of water to be a navigable one and in the absence of any other fact together with the averments in the bill it is presumed to be a navigable stream and will be considered as such.

The second ground alleged in the demurrer is nothing more nor less than a defense setting up a failure of appellant to perform its part of its obligation to the state in not complying with the charter and that it had not yet become a corporate entity. This is not a valid defense. *Harris* v. *Railroad Company,* 51 Miss., 602; *Grand Gulf Bank* v. *Archer,* 8 Smed. & M., 151; *Bohannon* v. *Biens,* 31 Miss., 355.

The third ground of the demurrer is untenable because the bill alleges that the railroad crosses appellee's rights three different times and that the piling on which it crosses is so contrived that it is impossible to navigate this stream of water.

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Brief for appellant.

The exclusive right in this case is a property right, fixed and vested. "The appropriation of water rights is a property right therein and cannot be deprived of this right without his consent, even for a public use without compensation." 30 Ency. Law, 398.

While appellant did not expropriate its right with dollars and cents, still the source of its charter is derived from the sovereign from which all municipal rights emanate, as much so in this case as land grants or any other contract made by the government upon which valuable rights become fixed and are protected by fundamental laws.

In the case of *Copper King Company Limited* v. *Wabash Mining Co.,* 114 Fed., 991, here we find that the property of the Copper King Mine was situated on the natural water course, known as "Dog Creek" and for more than five years it had diverted and appropriated for business and domestic purposes, all the water of said creek and had acquired an *exclusive right* to the use of said water. The Wabash Mining Co. subsequently sank a vertical shaft near the channel of this creek, which diverted the water from the creek and the Copper King Company obtained an injunction restraining it from further diverting this water, and the court in substance holds, "That where a mining company has acquired the *exclusive right* of the use of water of a certain creek in working its mines, another company has not the right in developing its mines by means of a shaft near the creek to cut off and divert the water flowing into it." Where a mine owner, at the time of commencing a shaft, cut off the water flowing into the creek which another mine owner had acquired the exclusive right to use and was cautioned by the latter, against cutting off such water, he was bound with notice of the consequence of his act. In an action to restrain defendant from diverting the water from the creek, which plaintiff had acquired exclusive right to use, the rights of the parties were in dispute and temporary injunction should have been granted." See *Green & Garren River Co.* v. *Ches-*

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apeake R. R. Co., 2 L. R. A., 540. This case is particularly in point for the reason that the appellant contends that it had the exclusive right to the use of this river and that the railroad company had no right to construct a bridge across it that would interfere with its navigability, and the court in dealing with the controversy virtually conceded that if the exclusive right had been given in this case, that the defendant or appellee, railroad company, could not have built the bridge across the river so as to interfere with the rights of the appellant. See also *Viedahan* v. *Commissioners*, 3 L. R. A. (N. S.), 1126; High on Injunctions, vol. 1, sec. 110; Cooley Const. Lim. (6th ed.), p. 342.

There is no question that an exclusive charter granted to carry on a lawful business, containing provisions for exclusive privileges of value to the grantee, so as to be, when accepted and acted upon by the grantee, an essential part of the transaction moving the grantee to accept it and invest his money on its faith, is *protected* as *a contract* by the federal constitution, art. 1, § 10, and being a valuable franchise or privilege increased in value by the exclusive right, *it is vested property* protected by the fourteenth amendment, and there can be no question of its being property.

If anything is settled by an unbroken course to decisions in federal and state court, it is that an act of incorporation is a contract between the state and incorporators. All courts are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken in the unshaken belief that it will never be forsaken. This doctrine was forever settled in the great case cited so often and through so many years—the *Dartmouth College case.*

For our court to permit the railroad company to continue to occupy the water right of appellant would be nothing more nor less than for the state to give the exclusive right to appellant to navigate the waters in controversy and then the court by its decree allow the railroad company to put in a line of

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Brief for appellee.

boats in opposition to appellant and destroy its business. The injury is accomplished just as much by stopping the navigation as it is by putting a line of boats in opposition to appellant and reducing the freight rates to such an extent as that it would destroy competition; in other words, if appellee can by a cheaper method prevent appellant from hauling freight by water, by obstruction and dams and piling, it is better it should do so than to fight appellee with a more costly means of competing with it until the "survival of the fittest."

Mayes & Longstreet, and *Chas. N. Burch,* for appellee.

We do not care to take issue with the appellant as to its ultimate right, if it shall show improvement and navigation of that part of Silver creek over which the appellee's bridges extend, to cause the appellee to remove obstructions to proper navigation; nor do we care to take issue on the question of the validity of the grant made to appellant by the state legislature. But we do contend that the appellant's bill is insufficient in averment, and that it fails to state the fact most essential and prerequisite to any right in the appellant to file the bill to abate the bridges as constituting a nuisance, namely, that they affect and injure appellant's rights.

A close inspection of its charter will show that the appellant is not given the sole and exclusive right to use and navigate the stream in its entirety; but is granted merely the right to use and navigate only such part thereof as it may improve. Now, the bill does not recite where the appellee's bridges were located, whether on any part of the stream which was improved by appellee, or not. Unless the appellant is able to aver that these bridges were located where they interfered with the use by appellant of that portion of the stream improved by it, or which would be improved by it, the appellant can have no private right which is vitiated by the operation of the bridges. We submit to the court, in illustration of our proposition, that a navigation company might have the right to complain of

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obstructions which worked injury to private rights because of bridges built over water it proposed to navigate, when the navigation company would have absolutely no right to complain of the presence of any bridges over the same stream at its head waters where, under no circumstances and with no improvement could the stream be made navigable in any sense.

The bill does not aver that the appellee's bridges are now being operated to any hurt or damage to appellant. Nor is it averred anywhere that these bridges and their mode of construction have at any time interfered with any sort of navigation of the stream attempted by appellant. Nor does the bill allege that it is the intention of the appellant ever to improve the stream under its charter.

If the contention of the appellant should be sustained, this court would be forced to instruct the railroad company to remove its bridges and piers from the stream, and then, after this tremendous expense was visited on the railroad company engaged as a common carrier in a great public enterprise and operating a public highway, it would be entirely optional with the appellant whether or not it ever improved that part of the stream in order to get the right to use it.

We admit that if the stream at the point where each bridge is located shall ever be improved and rendered navigable during the period of the charter by appellant, it may become incumbent upon appellee to remove the obstructions or to construct proper drawbridges. But the bill does not comply with any of the essential prerequisites to a bill seeking a mandatory injunction. Injunctions of this sort are granted with the greatest reluctance, and only when it is clear that they are essential to the effectuation of the right of the complainant.

In conclusion we state as follows:

1. Notwithstanding a bridge built improperly across a navigable stream may be a public nuisance, which may be abated at the instance of the public authorities, yet it may not be deemed to be a nuisance and abated at the instance of a private com-

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plainant unless special, present existing injury and damage are being inflicted on the private person or the private right.

2. In seeking an injunction in this case to compel the railroad company to remove three bridges, it is absolutely incumbent on the complainant to aver a right and authority and exclusive use over that portion of the stream where the bridges are located.

3. The complainant must show, not that it intends in the future possibly to do certain things which will render it possible to navigate certain portions of the stream, but in order to obtain radical action it must aver that all the acts prerequisite to an exercise of its rights have been performed by it; that it has done whatever was incumbent upon it to do, and that the obstruction is working injury to an existing condition and not to a possible condition which may exist at some time in the future in event of contingencies which may never happen.

Argued orally by *J. C. Longstreet,* for appellee.

MAYES, J., delivered the opinion of the court.

The demurrer in this case should have been overruled. The bill states a perfect cause of action. The legislature of the state had authorized and empowered the Silver Creek Navigation Company "to remove all obstructions from, and deepen and widen the channel of Silver creek, in the county of Yazoo; to cut and remove timber, logs, trees, and other obstructions on the banks or in the bed of said creek, which in any way interfered with the navigation thereof; and to build and construct all necessary locks and dams so as to make said stream, or any portion thereof, suitable and fit for the purpose of navigation, whether by steamboats or other water craft; and in consideration of the time, labor, and money to be expended by them in improving the said stream aforesaid, said corporation shall have the sole and exclusive right to use and navigate said stream, or such part thereof as it may improve, for the period of fifty years, and to charge tolls or freight for all persons or

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property transported by it, and to navigate the said stream with such water craft as it may see proper to use." It is alleged in the bill that the Silver Creek Navigation Company under this act was duly incorporated and organized, and the amount paid in as required by the act before it began business, which had been used in improving the stream. Subsequently it had set affoat in Silver creek several steamboats, and had operated them up and down the creek for a great many years. It is further alleged that after operating under this charter for many years, on account of defective construction, one end of the dike which it had built for the purpose of increasing the volume of water in the stream gave way, and since that time it had been unable to navigate as large craft in its business as it desired. It is further alleged that it now has the means with which to repair the dike and put the creek in good navigable condition for the operation of its business, and desires to do it, but is deterred by the fact that without the knowledge and consent of appellant, the Yazoo & Mississippi Valley Railroad Company has built a railroad across this creek at three different places, and that the road is so constructed at the place where it crosses the creek that it is impossible for appellant to navigate any kind of water craft in the creek; that the railroad of defendant is constructed of dirt and pilings, so arranged as to be an absolute bar to navigation in the creek, and, if appellee is permitted to maintain its road as now constructed, the franchise and water right granted to the appellant by the legislature will be annulled, and its property rights taken away and destroyed. The demurrer admits all these facts alleged in the bill; that is to say, that the legislature has granted to appellant the exclusive right to use and navigate the stream; that it has spent a large sum of money in improving the stream, and that it is now ready to begin its operations again, but, on account of the obstructions placed in the stream by the railroad company, an absolute bar to navigation is made

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Brief for appellant.

by the obstructions so placed by the railroad company. The bill states a good case on its face.

Reversed and remanded, with sixty days' leave to answer after mandate is filed.

HARRY N. AUSTIN *v.* WILLIAM H. MILLSPAUGH ET AL.

[43 South., 305.]

DAMAGES. *Measure. Loss of property. No market value. Hotel keeper. Guest.*

Where a guest's personal property, having no market value, was lost by the negligence of a hotel keeper, in whose custody it had been placed, his liability is more than nominal; a recovery may be had for the monetary value of the property to the guest.

FROM the circuit court of Lauderdale county.

HON. ROBERT F. COCHRAN, Judge.

Austin, the appellant, was plaintiff in the court below; Millspaugh and others, the appellees, were defendants there. From a judgment in plaintiff's favor for nominal damages merely, he appealed to the supreme court.

The appellant, an architect, became a guest of defendant's hotel; in doing so he placed in the custody of defendants, whose servant received the same, a package containing architectural drawings, plans and specifications for large and valuable buildings. The package, drawings, plans, etc., had no market value, but were of great value to plaintiff. The property after having been received by defendant, was lost by their negligence and the suit was for its value to plaintiff.

Amis & Dunn, for appellant.

In 3 American & English Encyclopedia of Law (2d ed.), pp. 584, 585, it is said, "In case of loss or injury to baggage the determining of the damages recoverable, is based upon the actual

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value of the articles lost or injured at the place for which they were destined. The value of such articles in this connection is not merely what they might have been sold for in money at public or private sale, but their value to the owner."

The measure of damages for lost baggage is its market value and interest if it have a market value; but if it has no market value, then the measure of damages is the value of its use to the owner. See *Spooner* v. *Railroad Co.,* 23 Mo. App., 403; *Railroad Co.* v. *Farrall,* 1 Tex. Civ. App., 1253; *Railroad Co.* v. *Cook,* 2 Tex. Civ. App., 659; *Railroad Co.* v. *Warren,* 3 Wyo., 134; *Fairfax* v. *Railroad Co.,* 73 N. Y., 167, 29 Am. Rep., 119.

"In case of loss or damage to goods which have no market value and which are chiefly useful to the owner, the measure of damages is not their market value at the time and place of delivery, but their value to the owner, and such value is not to be determined by his partiality to them, nor by what he might possibly sell them for, but by the actual money loss which he would sustain by being deprived of their use at the time." 5 Am. & Eng. Ency. Law (2d ed.), 390.

In the case of *Railroad Co.* v. *Nicholason,* 61 Tex., 550, it is said: "As compensation for the actual loss is the fundamental principle upon which the measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he could recover. Not any fanciful price that he might, for special reasons, place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so especially adapted to the use of himself and his family." See also *Railroad Co.* v. *Clarke,* 2 Tex. Civ. App., 512; *Railroad Co.* v. *Frame,* 6 Col., 382.

In *Green v. Railroad Co.,* 128 Mass., 221, it is held that when the portrait lost is that of the plaintiff's father it is competent for him to show that he had no other portrait of his

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father; and in the case of *Railroad Co.* v. *Burke,* 55 Tex., 323, it is held that the jury, may in such cases, look to the original cost of the portrait, and the possible cost of reproducing it in estimating the damages.

In 6 Cyc., p. 532, it is said: "While the market value is usually the basis for estimating the measure of plaintiff's recovery, there are cases in which no such rule is applicable. Goods which have no market value, such as second-hand furniture, clothing, and the like, are estimated at the real value to the owner. In the case of *Mathews* v. *American Express Co.,* 138 Mass., p. 554, it is held that the measure of damages for loss of architect's plans is held to be the reasonable expense of procuring new plans.

In the case of *Louisville, etc., R. R. Co.* v. *Stewart,* 78 Miss., 600, s.c., 29 South. Rep., 394, WHITFIELD, J., speaking for this court, holds the following language: "The true rule in such cases is not to inquire as to market value, since such articles have no market value, but to show the actual value to him who owns the portrait, taking into account the cost and expense of reproducing it, and such other considerations as in the particular case effect its value to the owner." In the case of *Southern Express Co.* v. *Owen,* 41 South., 752, which was a case where the plaintiff Owen sued the Southern Express Company for the loss of a manuscript, designed to be published as a text-book, and a case singularly like the one at bar, DENSON, J., speaking for the supreme court of Alabama, holds the following language:

"Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property, destroyed or lost, has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely.

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Brief for appellant.

Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value or plaintiff's damage must be ascertained in some other rational way and from such elements as are attainable. . . . Where the article lost has no market value, the rule of damages seems then to be its value to the plaintiff; and in ascertaining this value, inquiry may be made into constituent elements of the cost to the plaintiff in producing it." See also as sustaining this view, *Howard College* v. *Turner,* 71 Ala., 429; *Cooney* v. *Pullman Co.,* 121 Ala., 368; *Jones* v. *Noel,* 98 Tenn., 440; *Masterton* v. *Mayer Brookley,* 7 Hill, 61; *Sullivan* v. *Lear,* 23 Fla., 463; 3 Southerland on Damages (3d ed.), § 919.

Longino, Willing & Wilson, on same side.

Let us review for a moment the leading authorities on this question, and apply them to the case in hand. The latest utterance is to be found in the case of *Cooney* v. *Pullman Co.,* 121 Ala., 368, in which the court held: "The statement of value of articles stolen or lost is the market value where they have such value, otherwise the actual loss in money the owner would sustain by being deprived of the articles especially adapted to the use of himself or family." The Alabama court cited with approval the case of *Railroad Co.* v. *Stewart,* 78 Miss., 600, in which case Chief Justice WHITFIELD, in delivering the opinion, said: "The true rule in such cases is not to inquire as to market value, since such articles have no market value, but to show the 'actual value to him who owns the portraits, taking into account the cost, the practicabilty and expense of replacing them, and such other considerations as in the particular case affect their value to the owner.' *Green* v. *Railroad Co.,* 128 Mass., 221; *International R. R. Co.* v. *Nicholson,* 61 Tex., 550; Hutchinson on Carriers, sec. 770 *b.*"

Plaintiff was clearly entitled to more than nominal damages. What was the value of the plans to him? They were certanly worth more than one dollar, the pitiful sum allowed

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Brief for appellees.

in this cause under the instruction of the court. All the witnesses unite in saying that to reproduce the plans and specifications which were lost would involve expenditure of talent, time and money, worth, variously estimated by them, from six hundred to eleven hundred dollars. Can it be said then that the plaintiff was entitled to recover only one dollar in this cause, when, according to the testimony of Krouse, the expert introduced by the defendant, the value of the actual time required to make these plans and specifications was reasonably worth between six and seven hundred dollars. The plaintiff testified that these plans were of value to him. Barnes, a witness on behalf of plaintiff, testified that the plans would be of value to an architect, and Krouse testified to the same effect. It is true that only one set of plans had ever been used, to-wit: the plans for the bank building. But these plans constitued the stock in trade of plaintiff, who was an architect. The plaintiff testified that plans of the kind sued for were of value to an architect in going after work. That the plans in question were original drawings and specifications, and they were made to secure work and were valuable to plaintiff as instruments of service to aid him in securing work.

G. Q. Hall, Hall & Jacobson, for appellees.

Plaintiff's theory seemed to be that the cost of producing the plans and specifications measured their value to him, and he testified, over defendant's objection, to an outlay of three months and three weeks' time in their preparation, and attempted to reduce that to a money basis, by testifying, and having his witnesses testify, to the customary weekly wages paid draughtsmen, and a reasonable fee for the services of an architect in supervising a draughtsman so engaged; but he admitted that he employed no draughtsman and supervising architect and did the work himself at a time when he was otherwise idle and there was no demand for his services.

On this point the rule seems to be that while cost of the prop-

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Brief for appellees.

erty lost or stolen is evidence to be considered in connection with other facts in determining the actual value, it is not the measure of the guest's recovery. 16 Am. & Eng. Ency. L. (2d ed.), 544.

It seems to us that this leads, irresistibly, to the conclusion that the "use" to the owner of the thing lost, is the only fair measure of the value to him. Every statement of the measure of damages for loss or destruction of property having no market value recognizes this. In their brief, counsel for appellant say: "The measure of damages for lost baggage is its market value and interest, if it have a market value; but if it has no market value, then the measure of damages is the value of its use to the owner" (citing authorities); and again, "In case of loss or damage to goods which have no market value and which are chiefly useful to the owner, the measure of damages is not their market value at the time and place of delivery, but their value to the owner, and such value is not to be determined by his partiality for them nor by what he might possibly sell them for, but by the actual money loss which he would sustain by being deprived of their use at the time." We cite the following note from 21 Am. & Eng. Railway cases, 125: "Of course in case of the destruction or loss of goods by a carrier the amount of damages recoverable is based directly on the value of the goods lost. This in the case of goods that have no market value is often very difficult to fix, especially where, as here, the value depends chiefly on the use to which they can be put by their owner. The rule for estimating the value in such cases as laid down in the principal case is undoubtedly correct. The damages recoverable is the actual loss in money the owner would sustain by being deprived of the articles adapted to the especial use for which the articles in question were adapted—not any fancy price the owner might set upon them for special reasons, nor on the other hand what they could be sold for. *Fairfax* v. *New York, etc., R. R. Co.*, 73 N. Y., 167, 3 Suth. Dams., 293; Mayne's Law of Damages (3d ed.), 153, 154.

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Opinion of the court.

Plaintiff claimed no particular use for these plans and specifications, like the architect, in *Mathews* v. *Express Co.*, 138 Mass., 554, cited for appellant, who was clearly under necessity to provide himself with new plans and specifications in order to go on with the work in hand. Plaintiff's only claim of use for his plans and specifications was in prospective bidding for business; but he admitted, as he had to, that this use was dependent upon several contingencies, that during his residence in Anniston he had no use for them and none since, and that, at the time of their loss, he was employed as a mere draughtsman in the office of Hull Brothers, Jackson, and had no use for them there. Furthermore, he admitted on cross-examination, that prospective builders were influenced by pictures of the proposed buildings rather than by plans and specifications and that he still had the pictures, and that new plans and specifications had always to be prepared for work thus secured, the old plans merely furnishing a possible idea for incorporation therein. The most that appears is that there was a possible use for these plans and specifications in the dim and distant future should a hitherto unappreciative public afford customers for the buildings therein proposed—contingency dependent upon contingency. We submit that the possibility of such demand or use is entirely too remote to constitute a just predicate for the recovery of substantial damages against defendants, appellees, here; and we cite as applicable the following text from 5 Am. & Eng. Ency. (2d ed.), 398: Damages cannot be recovered for the loss of profits or of any advantage that the shipper or consignee might have secured where such profits or advantage would depend upon the happening of future contingencies; they must be such as the plaintiff would have been assured or had the carrier been prompt in delivering the property carried. Otherwise they are speculative merely and their loss cannot be considered as an element of damage.

WHITFIELD, C. J., delivered the opinion of the court.

The court below erred in refusing to give instruction No. 5

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for the plaintiff as asked, which instruction is in the following words: "The court charges the jury that, in case they shall find a verdict for the plaintiff, then they should assess such damages in his favor as will, in their judgment, under all the testimony in the case, fully, fairly, and reasonably compensate him for the loss sustained; that they should not value plaintiff's property, so lost as testified about, at any fanciful or unreasonable price, nor, on the other hand, should they consider it of little or no value, because of its want of market price; but they should, as nearly as they can, from the testimony in the case, determine the reasonable, just, and fair value of the property to the plaintiff, at the time it was delivered to the defendant's porter, at the depot."

It also erred in granting to the defendant the following instruction: "The court charges the jury that, if they believe from the evidence that plaintiff's plans and specifications had no market value, and that he had put his services and other expenses into their preparation without reference to any particular job, and upon the mere chance or possibility that he might have need or use for them in soliciting work in the future, but that there has been no demand for said plans and specifications, and plaintiff had no particular use for them at the time of their loss, and was for some time after their loss not engaged in business for himself, but employed as a draughtsman by others at a salary, and there was no use or demand for them in that capacity, plaintiff can only recover nominal damages for the loss of said plans."

The true principal was definitely settled in the case of *L. & N. Ry. Co.* v. *Stewart,* 78 Miss., 600, 29 South., 394. See also, *Green* v. *Railroad Co.,* 128 Mass., 221, 35 Am. Rep., 370; *Mather* v. *Am. Express Co.,* 138 Mass., 55, 52 Am. Rep., 258; *Southern Express Company* v. *Owen,* 41 South., 752, from the supreme court of Alabama, where the court said: "Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruc-

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tion or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value or plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. . . . Where the article lost has no market value, the rule of damages seems then to be its value to the plaintiff; and in ascertaining this value inquiry may be made into constituent elements of the cost to the plaintiff in producing it." See, also, as sustaining this view, *Howard College* v. *Turner,* 71 Ala., 429, 46 Am. Rep., 326; *Cooney* v. *Pullman Car Co.,* 121 Ala., 368, 25 South., 712, 53 L. R. A., 690; *Jonas* v. *Noel,* 98 Tenn., 440, 39 S. W., 724, 36 L. R. A., 862; *Masterton* v. *Mayer Brookley,* 7 Hill (N. Y.), 61, 42 Am. Dec., 38; *Sullivan* v. *Lear,* 23 Fla., 463, 2 South., 846, 11 Am. St. Rep., 388; 3 Southerland on Damages (3d ed.), sec. 919.

Reversed and remanded.

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Statement of the case.

WILKS P. KRETSCHMAR, RECEIVER, v. FIRST NATIONAL BANK OF GREENVILLE.

[43 South., 474.]

ASSIGNMENTS FOR BENEFIT OF CREDITORS. *Secured creditor. Distribution.*

A non-preferential assignment for the benefit of creditors must be treated as providing for payment of liabilities ratably, and a creditor who holds collateral security for his debt is not entitled thereunder to dividends on the face of his claims without crediting the value of the collaterals.

FROM the chancery court of Washington county.

HON. PERCY BELL, Chancellor.

Kretschmar, receiver of the Merchants & Planters Bank of Greenville, appellant, was complainant in the court below; the First National Bank of Greenville, appellee, was defendant there. From a decree in favor of the defendant the complainant appealed to the supreme court.

In June, 1905, the Merchants & Planters Bank of Greenville, being insolvent, made a general assignment of all of its property, without preference, in accordance with Code 1892, ch. 8, for the benefit of creditors. Among other debts it owed the appellee, the First National Bank of Greenville, $10,979.44, which was partially secured by collateral. This collateral, amounting to $5,603.15, was duly collected by the appellee and applied to its debt, reducing the same to $5,376.29, unsecured. Kretschmar, the appellant, in February, 1906, made a twenty per cent pro rata dividend payment on the debts of the bank, by order of the chancery court, calculating the twenty per cent, in the case of appellee's debt, upon the original $10,979.44 instead of on the unsecured balance of $5,376.29.

In January, 1907, the receiver, Kretschmar, reported that he had on hand for further distribution to creditors additional

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Chancellor's opinion.

funds sufficient to make another twenty per cent pro rata dividend payment. The report stated further "that the First National Bank of Greenville has collected all the collateral held by it to secure the debt of $10,979.44 owing to it by the Merchants & Planters Bank on June 9, 1905, said collateral amounting to $5,603.15, leaving a balance of $5,376.29; and said First National Bank is entitled to a pro rata dividend to the amount of twenty per cent on the said balance of $5,376.29, which amounts to $1,075.26, deducting however therefrom such sum as was previously paid to the said First National Bank in the first twenty per cent pro rata dividend payment heretofore made in February, 1906, over and above said sum of $1,075.26. The amount overpaid to said First National Bank on said first dividend in 1906, was $1,120.63; *i. e.*, said receiver not only paid said First National Bank the amount due on said twenty per cent, to-wit, $1,075.26, but in addition thereto paid $1,120.63. Hence the receiver should now deduct from said sum of $1,120.63 the sum of $1,075.26, which will leave the said First National Bank indebted to the receiver in the sum of $45.37." The appellee's contention was that the collection by it of the aforesaid collateral in no way affected its right as a creditor to receive twenty per cent dividend based upon the original debt as it existed before being reduced by collection and application thereon of the said collateral.

The opinion of the learned chancellor in the matter is reported in full and is as follows:—

"This matter was brought before the court for decision upon the proper method of distribution of dividends arising from a collection of assets of an insolvent bank to secure creditors.

It may be broadly stated in the beginning, that there are two views entertained by the courts upon this subject and two rules have been enunciated which for the sake of brevity, will hereafter be designated as the United States rule and the Mississippi rule.

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Chancellor's opinion.

The United States rule declares that the dividend shall be paid to secured creditors upon the basis of the debt owing at the time or date of the insolvency, regardless of the collateral security held or collected by the creditor, with a provision that in no case should more than the debt be paid, and that all dividends or securities above the amount of the debt should be returned to the receiver.

The Mississippi rule is as announced in *Duncan* v. *The Bank,* 84 Miss., 467, that dividends shall only be paid to the creditor after he shall have credited the indebtedness with the value of the securities held by him.

The United States rule is followed by Connecticut, Illinois, Kentucky, Michigan, Nebraska, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Wisconsin and England.

The Mississippi rule is followed by Iowa, Kansas, Maryland, Massachusetts, New Jersey, Ohio, Tennessee and Washington.

With all deference to the learned chief justice who enunciated the Mississippi rule, and still ornaments the supreme bench, after careful and exhaustive investigation I am constrained to differ from the views enunciated by him, and to the end that the supreme court may again consider the matter in the light of the authorities which incline to the opposite view and of the experience of this court in the conduct of the affairs of insolvent banks, this decision is made and the case submitted for reconsideration by our court of last resort.

The United States rule, as enunciated in *Merrill* v. *Bank,* 173 U. S., 131, 19 Sup. Ct., 360, 43 L. Ed., 640, supports the finding of the lower court and exhaustively considers the subject.

The dissenting opinion in that case which was adopted by the Mississippi court, is in the opinion of this court, based upon a misconception and is fallacious.

There have been two rules followed by the courts in the mat-

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ter of distribution of assets of insolvent estates, as given above; the United States rule being also called and known as the chancery rule, while the Mississippi rule is known as the Bankruptcy rule.

I think it will be found that the Bankruptcy rule, when followed, is usually based upon some statutory enactment prescribing that method of distribution. It is so in the cases which I have read, with but few exceptions, and these exceptions follow the courts which were led in their decisions by a statute.

Our only statutory requirement is that the distribution shall be made ratably, which I submit, is done under the United States rule.

In the various discussions of the subject, which have marked the progress through the courts, the end and aim of the courts appear to have been to follow that method of distribution which, in their opinion, would be the most equitable. Hence, Judge TAFT announces, in the case of *Armstrong* v. *Chemical Bank,* one of the most clearly reasoned and cogently expressed opinions, which the court has read, that there have been four rules suggested to govern distributions; rule 1 being the Mississippi rule, or Bankruptcy rule; rule 2 being the United States rule, with the modification that the creditor secured shall prove his debt, crediting the securities as collected and receiving the dividends on balance due. Rule 3 is a modification of rule 2, requiring creditors to prove for debt less the payments prior to probate. Rule 2 is rejected by all authorities, as it virtually denies the vested right of the creditor in the funds to be distributed. Rule 3 is so slightly followed as to be negligible. Rule 4 is the United States rule, or equitable rule.

The reasoning upon which the United States rule is based, is that the debt owing by the creditor is a debt regardless of the security, and in the absence of a statutory enactment directing otherwise, will be considered so far as dividends are concerned as though it were unsecured.

That this rule is reasonable and just is apparent, for the

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creditor before the insolvency had the right to proceed to the collection of his debt regardless of the security. He could credit it the debt therewith and sue for the balance or he could disregard the security and sue for the entire debt, and surely no court would endeavor to force him before obtaining judgment on his debt to credit it with the value of the security. To be sure, he would be obliged to return to the debtor the security when the debt was paid, but not until then. Should the fact of the insolvency of the debtor alter the rights and remedies of the creditor? Would his death do so? Certainly not. The confusion that has arisen and has clouded the decisions following the Mississippi or Bankruptcy rule has been based on the failure to distinguish between the debt itself and the right to share in the fund for distribution.

At the date of the insolvency the debtor owes the debt. The debt is then provable, and the subsequent dividends thereon do not reduce the amount of the base upon which the calculations for other dividends are made. The debt until paid exists, and securities cannot, and do not, affect it, until it is paid. The creditor has a vested right in the funds of the estate for distribution which is entirely different from his debt and the Mississippi rule, by obliging him to credit his debt with the "value" of the securities destroys his right.

If his debt is for $10,000 and his securities amount to $5,000, then under the Mississippi rule his debt is reduced to $5,000. If the total indebtedness of the debtor at the time of insolvency was $5,000 then the creditor has a vested right to twenty per cent of the general assets; under the Mississippi rule his right is cut in half, and reduced to ten per cent. What justification is there for his deprivation by a chancery court, in the absence of express statutory enactment? It is certainly impossible to claim that this is equitable.

Another source of confusion has arisen and it has been urged that in the event of a creditor for $10,000 with $5,000 collateral, and the collection thereof, as well as fifty per cent divi-

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dend, would be paid in full, whereas an unsecured creditor for $5,000 would be paid only $2,500, which say the courts holding to the Mississippi rule is unjust and inequitable, for the reason that the first creditor is unsecured for $5,000 of his debt as is the second creditor and by reason of having security is paid in full, to the damage of the second creditor. The fault here is that the court errs in supposing that the $5,000 of security secured one-half of the debt. It is security for all of the debt, and he is not an unsecured creditor for any sum at all. The two creditors cannot be compared, for they are not in the same class. And in addition to his security, the first creditor has a vested right (and here is the crux of the situation) in the general assets of the debtor. He has a right against the general assets of the debtor prior to insolvency. How in the absence of a statute does he lose this right, and how can a court of equity deprive him thereof, to the benefit of the unsecured creditors? If he had such a right as to be warranted in disregarding the collateral and bringing suit, and levying on the general assets of the creditor, how does he lose this right? It is emphatically denied in *Kelleck's case,* handed down by the parent of our chancery courts, that he cannot be so deprived, and that the insolvency *per se* cannot alter the contractual relations previously existing.

I submit that the dissenting opinion in the *Merrill case, supra,* is based on such a statute, as disclosed by a careful reading thereof, and we in Mississippi have not such a statute. The acts of Congress, which governed the minority of the United States supreme court, can have no bearing in Mississippi.

It is claimed by our court in the *Duncan case,* that the basis of the Mississippi rule is the equity rule that a creditor having two funds upon which to rely (here his collateral and the general assets), must first have recourse to that fund to which other creditors, who have but one fund upon which to rely, have no access. This rule is primary and might apply here but for the

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modification which Story lays down in secs. 560, 564 and 633 of his work on Equity, and which Pomeroy enunciates in sec. 1414, and note 6 thereto, of vol. 4 of the 2d edition of his classic work, and which his son states in sec. 866 of vol. 6 of the same work, to the effect that the creditor having recourse to two funds must not be forced to apply to one of them and exhaust it where he will be made to suffer thereby and by reason of the failure of another to take security. In the case cited above the secured creditor would lose by such action $2,500. Also do the above great authorities announce that in all events the debt must be paid. These authorities it appears to me to dispose of the position heretofore assumed by our supreme court.

Surely a general equity court, without statute, save that directing the ratable distribution of assets, must follow the general rule as enunciated and followed by Story, Pomeroy and the various courts and authorities mentioned in "Cyc.," p. 571 of vol. 5; and in Am. & Eng. Ency. of Law, 2d ed., vol. 23, p. 1118, and vol. 3, p. 141; and by the great weight of authority in the world governed by English law, the exceptions being as I have stated those where a statute governed, or the lead of such a statute-guided court was followed.

I ask the court to read again and most carefully the authorities cited in the *Duncan case.* Not that I wish to be misunderstood as insinuating that the court does not read authorities, but that some time having elapsed since the rendition of that opinion, that matter is not fresh in the minds of a court with so heavy a burden to bear as ours.

Especially do I think the opinion in 28 L. R. A., p. 231, very able and convincing.

Again under the Mississippi statute these matters are placed in the chancery court for adjustment and I can see that therein the Chancery and not the Bankrupt rule should govern. A "ratable distribution" is not gained by the Mississippi rule, which is inequitable in its effect, as depriving the secured cred-

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itor of his vested rights, and of giving him less than his ratable share of the general assets.

Also it is impossible under the Mississippi rule for the secured creditor whose security does not pay him in full, to ever collect all of his debts. And this the writer says is imperative.

I wish furthermore to point out to the court, certain facts for this unconscionably long opinion. I beg their indulgence, pleading my interest in the matter and the wrongs I have seen attempted under the Mississippi rule, which could not have been performed under the United States rule, and the fact that I have wished this matter sent up that the possibility of fraud might be removed from future matters of this kind. I have had some six banks thrown into my court and have worked day and night endeavoring to bring order out of chaos, and also to have punished the persons who were responsible for the failure. In one, the first one, the present case, there was a large amount (over $100,000) of securities out. It was only by the most severe exertions and the assurance that the distribution would be made on the United States rule, that these secured banks held the security, and, with the aid of my receiver, collected their debts. This was the case with virtually all of them. There was no sacrifice of the securities, and there was a saving thereby of many thousands of dollars to the depositors. The result has been a payment of forty per cent to them. And I again ask the indulgence of the court, for this is not theory but solid facts which I am stating. In the case of the Bolivar County Bank there was a different disposition, the rule enunciated in the *Duncan case* was considered by creditors in all of its bearings and one of the creditors in one of the matters (and this case will also come before this court on my refusal to allow it to account), sold its collateral at public outcry, having given notice to the receiver and the public. The receiver had no funds to buy the security, and so at this sale this creditor bought in for itself, collateral to the value on its face of over $12,000, for $55 (thus securing a $5,000 note) and other collateral of the

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face value of over $15,000 for $2,424, less certain payments, or including such. In other words, collateral to face value of something like $27,000, securing only $20,000, was sold publicly and bought in by the holder for really only a bit over $1,000. Now suppose they endeavor to collect (as they are doing), and such should be allowed even a ten per cent dividend on the balance of the debt with interest, amounting now to $20,000, they would collect the $27,000 collateral and $2,000 under the Mississippi rule, and obtain $28,000 for a debt of $20,000, surely this is not equity, delighting in equity, nor should equity afford opportunity for such a scene nor the necessity for litigation over it. The Mississippi rule opens wide the door for fraud, virtually forces it, for it compels a sacrifice or sale or realization upon the securities, before dividends will be allowed, and then a sharing in dividends. Whereas the Chancery rule encourages a conservation of the collateral and in no case can one collect more than his debt. The worst contingency contemplated by the minority in the *Merrill case* was the payment in full of secured creditors, to the injury of the unsecured. But under this rule and that of Mississippi, the secured creditors cannot obtain more than their debt. The United States rule is a benefit as it saves and secures assets and thus all creditors benefit. Otherwise there is fraud, or vast or expensive litigation.

I ask the court to consider the possibilities of the practical effects of their rule in the light of my actual experience. This litigation could be avoided, fraud eliminated, assets preserved and depositors saved money, as it was in this case by observing the Chancery rule and not the Bankruptcy rule. The theory of the court was good as a theory, but it unfortunately did not consider human nature in connection therewith, nor the fact that generally speaking, men will take advantage of every opportunity to enrich themselves at the expense of others and that law which has reason on its side and also makes it to men's

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interest to be honest and careful of the interest of all is a good law.

Under the Chancery rule there is some check on secured creditors, but under that of bankruptcy none.

It is a matter of business and I am dealing only in facts, those facts which have caused me to reach the conclusion after hard and conscientious study that the Equity rule is the proper rule, in the absence of statute. Also is there not some consideration to be given the idea that to the diligent who secure a security either total or partial equity will extend favor and that they are, apart from other consideration, entitled to the fruit of their forethought and diligence?

Again I call attention to the fact that before insolvency there were four courses open to a debtor. 1. He might pay part of his debt and let the collateral pay the balance. 2. He could pay all and receive the collateral. 3. The collateral could be collected and pay the debt. 4. The collateral could pay part of the debt and suit could be brought for the balance. In all of these it will be seen that the creditor is entitled to his debt and all of it, that the collateral need not be regarded. How can and why should insolvency alter these contractual relations and vested rights? The debt and the right to a share in general assets are totally different and unaffected by collateral.

I think, after all my experience with these matters, that the better rule would be that the dividends must be declared on the debt due at the date of the insolvency, that all collateral must be collected in full and credited to the debt or turned back to the receiver. Permitting a sale or compromise of the collateral, save under orders and approval of the court, opens wide the door to fraud.

I am convinced that the desire of the supreme court of Mississippi is solely to announce the law as it is, and, where there is a doubt, to follow the line of authorities wherein dwelleth right. I also feel equally sure and confident that the present rule opens wide the door to fraud, encouraging tricky deal-

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ings, and necessitating litigation. For these reasons, I wish the matter again submitted that the supreme court may look carefully into the case, and eliminate future fraudulent dealings of secured creditors, who fear the workings of the Mississippi rule. For the reason that I respectfully differ with the former finding, I ask another ruling.

PERCY BELL, Chancellor."

Shields & Boddie, for the appellants.

The learned chancellor in the court below, allowed the appellee, the First National Bank, to share in the two distributions of the dividends, in accordance with the rule declared by the supreme court of the United States; that is, allowed the appellee to receive dividends upon the entire amount of the indebtedness due to it by the insolvent Merchants & Planters Bank, at the time of the assignment.

This court, however, in the case of *Union & Planters' Bank* v. *Duncan,* 84 Miss., 467, has adopted the rule here contended for by appellant, that the value of the collateral collected by the appellee, should be deducted from the original debt due to it, and dividends be distributed upon the balance.

We submit, that under the rule in the case cited, the decree of the lower court should be reversed, in order that a proper decree may be rendered below, in accordance with such view.

LeRoy Percy, for appellee.

The principles upon which the decree in this case was rendered, are clearly set forth in the opinion of the learned chancellor below. That these principles work for equity and righteousness, is forcefully shown by the statement of the chancellor's own experience. I feel that I can add nothing, and I accordingly refer to it, as upholding the contentions of the appellee.

Argued orally by *LeRoy Percy,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

After the most careful consideration we adhere to the view

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Opinion of the court.

announced in *Union & Planters' Bank* v. *Duncan,* 84 Miss., 467, 36 South., 690. The equitable rule was first authoritatively announced in England in 1868 by Lord KELLOCK. This equitable rule was expressly abrogated by the British Parliament about 1873, by the Judicative act of August 5, 1875, and the amendment of August 11, 1875. If, therefore, this court were to adopt and persist in that so-called equitable rule, it would be itself in the attitude of following a rule of distribution expressly abrogated in England, whence the doctrine originally came to us, through Lord KELLOCK. This would be a most anomalous condition.

Two other observations occur: (1) That an assignment without preferences is practically the same as an assignment with the word "ratable" in it; and (2) that if the view urged with such marked ability by the counsel who argued this case orally, attempting to show that in any event a different view from the one announced in the *Duncan case* should prevail in the case of assignments which are administered under our statute in the chancery court, should be upheld, then we would have the singular condition of having three rules for distribution; the two between which the courts have been so divided—the Bankruptcy rule and the Equity rule—and the third, to-wit, a rule to be adopted in cases where assignments have been made in this state. It seems to us, after mature deliberation, that this would increase, instead of lessen, the confusion.

The decree is reversed, and the cause remanded for a decree in accordance with this opinion.

CALHOON, J., dissents.

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Statement of the case.

WILKS P. KRETSCHMAR, RECEIVER, v. WATT W. STONE.

[43 South., 177.]

CORPORATIONS. *Insolvency. Receiver. Stockholders' liability. Illegal dividends. Suits.*

A receiver of an insolvent corporation, when authorized by the court in which the receivership is pending, may sue at law and recover from stockholders dividends paid them by the corporation when insolvent.

FROM the circuit court of Washington county.

HON. A. McC. KIMBROUGH, Judge.

In June, 1905, the Merchants & Planters Bank of Greenville, Mississippi, suspended payment, and made a general assignment of its business for the benefit of its creditors. The assignee named by the bank declined to serve and one Walker was appointed receiver of the bank by the chancery court, who, after qualifying, took charge of the bank's business and assets. In November, 1905, the receiver being authorized by a decree of the chancery court to institute legal proceedings for the collection of debts due the bank and to sue the stockholders for any dividends fraudulently or improperly paid them, instituted suit before a justice of the peace against the appellee, Stone, filing a written statement of his cause of action, demanding judgment for $110 because of payments by the bank to Stone of two dividends, $60 and $50 respectively, on stock of the bank owned by him. The written statement of the cause of action or declaration recited the appointment and qualification of the receiver and the authority to sue conferred upon him by the chancery court, and alleged that the bank was insolvent in January, 1904, and January, 1905, when the respective dividends were paid to appellee and they had not been earned. The written statement or declaration further alleged that the bank was indebted to numerous creditors whose debts existed when each of

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Brief for appellant.

the two dividends were paid. The receiver, having lost his case before the justice of the peace, appealed to the circuit court, where the appellee, Stone, filed a demurrer to the written statement of the cause of action or declaration claiming that the chancery court alone had jurisdiction of the case; that the receiver had no authority to institute the suit either at law or in equity; that the right of action existed only in the creditors of the bank who were creditors when the dividend payments were made. The circuit court sustained the demurrer, and dismissed the suit.

Walker resigned the receivership shortly after the rendition of the judgment of the circuit court, and Kretschmar, his successor, appealed to the supreme court.

The action by the receiver against the appellee was based upon Code 1892, § 852, which is as follows: "No part of the capital stock in any corporation shall be withdrawn or diverted from its purpose, nor a dividend declared, when the company is insolvent, or would be rendered insolvent by such withdrawal or the payment of such dividend; and the directors who assented to such withdrawal, or declared and paid such dividend, as well as the stockholders who received it, shall be jointly and severally liable to creditors whose debts then existed, to the extent of such withdrawal or dividend and interest."

Shields & Boddie, for appellant.

The declaration stated a cause of action against appellee, under Code 1892, § 852. It alleged that the bank was insolvent when the dividends were paid to appellee as stockholder, and when the suit was brought, that there were creditors of the bank who were such when the dividends were paid and when the suit was brought. And in addition it distinctly stated that "on the 4th day of October, 1905, by decree of the chancery court of said county, plaintiff, as receiver of said bank, was authorized and directed to sue for all indebtedness then due, or to become due, to such bank; and was authorized and directed to

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Brief for appellee.

sue the stockholders of said bank for the dividends improperly and fraudulently paid them by said bank in January, 1904, and January, 1905." The demurrer admitted the truth of the allegations of the declarations. It follows, then, that if at the time of the dividend payments the bank was insolvent, the payments amounted to a diversion of the capital in favor of a stockholder, and the stockholder became liable for the amount thus paid out.

It is contended by counsel for appellee that the receiver of the bank had no legal right to bring this suit; that the action existed only in favor of those creditors of the bank whose debts existed at the time of the dividend payments. There can be nothing in such contention, as regards appellee, for the chancery court, to which the receiver is accountable, has ample jurisdiction to see that proper application is made of the proceeds of the judgment when recovered against the stockholder. Upon recovery by the receiver in the circuit court, the chancery court will doubtless instruct disposition of the recovered dividend payments to be made to or among those creditors "whose debts then existed" when the dividends were paid.

There is nothing in Code 1892, § 852, which precludes a receiver from instituting suit to collect the dividend improperly paid. The statute is merely declaratory of the liability of stockholders under certain conditions, and does not affect the right already existing of any proper party to take steps in law.

That the receiver has the legal right to institute suit in a case such as this, is evident. He is the representative officer of the chancery court, and as such is empowered under the common law to sue either at law or in equity.

A. J. Rose, for appellee.

Under Code 1892, § 852, a stockholder who receives a dividend from an insolvent bank is liable "to creditors whose debts then existed" at the time of such dividend payment. The statute does not say that the right to bring suit against the stock-

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Brief for appellee.

holder shall accrue to a receiver of the insolvent bank. In fact, the language of the statute referred to would seem to indicate that only creditors whose debts existed when the dividends were paid could bring suit to recover the same.

The statute gives the right of action only to a limited class of creditors, those whose debts were incurred after the payment of the dividend having no right of action for recovery of the dividend. Now a receiver represents the corporation and also all of the creditors of the corporation, not merely those to whom a right of action is given under the statute. If the statute gave a right of action to the bank, the receiver as its representative could then sue; and if the right of action were given to creditors who were such when the dividend was declared, and also to subsequent creditors, it might then be urged that the receiver, as representative of all the creditors, was the proper party to institute the suit. But such cannot be the case under the concise language of the statute. The right to sue exists only as to creditors "whose debts then existed."

As no right of action is created by the statute in favor of the bank or to creditors generally, and as the liability of the stockholder is limited strictly to a certain class, it follows that, if the receiver had the right to sue, it would be obligatory on him to distribute the proceeds of his recovery among a certain class and to the exclusion of others. He would have to ascertain not only who were creditors of the corporation, but also who were creditors when the dividend was declared, and who were subsequent creditors. Certainly, considering the clear wording of the statute, and the necessity upon the part of a receiver, even if he had the right to sue, of determining among many different creditors their respective rights in the recovery, the lower court's action was correct, and the judgment should be affirmed.

But if it be held that the receiver was the proper party to institute suit for recovery of the dividends, the suit should have been in the chancery court. Equity should have exclusive jurisdiction of a suit of this kind. The rights of the receiver,

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Opinion of the court.

unless expressly enlarged by statute, are practically those of the creditors he represents, as regards recovery in a case of this kind, and should be exercised in court of chancery. The capital stock of a corporation is a trust fund for the benefit of creditors for many purposes, and any payment of a dividend unearned, while the corporation is insolvent, is an impairment of this fund. The general practice in such case is to commence an action in equity on behalf of all creditors, in the nature of a creditors' bill. 2 Cook on Corporations (5th ed.), secs. 548, 549. "The proceeding to enforce liability of stockholders for dividends unlawfully received is an equitable one, and an action at law is not maintainable." 9 Am. & Eng. Ency. Law (2d ed.), 703.

MAYES, J., delivered the opinion of the court.

While there seems to be much conflict of authority as to the right of a receiver to institute suits, the question seems to have been settled in this state as far back as the case of *Freeman* v. *Winchester,* 10 Smed. & M., 577. The weight of modern authority is to the effect that a receiver may bring suit, either in courts of law or equity, when given authority to do so by the court which appointed him. It is expressly alleged in the declaration that the chancery court had empowered the receiver to bring suit to recover the dividends alleged to have been unlawfully paid, and the demurrer admits all the facts alleged. This demurrer should have been overruled. *Wilkinson* v. *Rutherford,* 49 N. J. Law, 241, 8 Atl., 507; 1 Pomeroy's Equitable Remedies, sec. 180; 17 Ency. Plead. & Prac., p. 812, and note; *Freeman* v. *Winchester,* 10 Smed. & M., 577.

Reversed and remanded.

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Statement of the case.

THOMAS G. FEWELL ET AL. v. CITY OF MERIDIAN.

[43 South., 438.]

1. MUNICIPALITIES. *Defects in sewers and drains. Notice. Adoption of drain.*

Where a municipality assumed and exercised control and dealt with a manhole and a cross-pipe as parts of its drainage system, it is liable to the owner of adjacent premises for damages resulting from their wrongful construction, if, being duly notified of the defects, it fail to make correction, although the cross-pipe was originally placed in position by a previous owner of the premises.

2. SAME. *Insufficient drainage.*

A municipality is liable for damages due to the insufficiency of an artificial drain substituted by it for one originally on plaintiff's premises.

FROM the circuit court of Lauderdale county.

HON. ROBERT F. COCHRAN, Judge.

Fewell and wife, appellants, were plaintiffs in the court below; the city of Meridian, appellee, was defendant there. From a judgment for defendant the plaintiffs appealed to the supreme court.

Plaintiffs owned and occupied as a homestead a lot in Meridian, having purchased it from one Meyer. The lot was lower than the surrounding property, and the city constructed drains and sewers to carry off the surface water which passed along the adjacent streets, and constructed a manhole in a street in front of plaintiffs' lot into which the surface water flowed. Meyer, who built the house on plaintiffs' lot, run a sanitary sewer pipe from his house to the city sewerage system, which was passed through the manhole in front of plaintiffs' property. Plaintiffs' declaration alleged that the drainage pipes constructed by the city were insufficient to carry off the surface water, and that the sewer pipe running through the manhole

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Brief for appellants.

in front of plaintiffs' property obstructed the flow of water through the drain pipe leading from the manhole, and thereby caused the drainage pipes to overflow and divert the water on to plaintiffs' property, to their damage. It was further alleged that it was the duty of the city to construct proper drains to carry off the surface water and to refrain from turning water on plaintiffs' property, and that, though frequently notified by plaintiffs of the defective condition of the drainage pipes and improperly constructed manhole through which the sewer pipe ran, the city refused to remedy same, but continued to maintain the defective and imperfect drainage system, and that by accumulation of water on plaintiffs' property it was depreciated in value. The case went to the jury under instructions from the court, and a verdict was returned for defendant. The actions of the trial court in granting instructions for the defendant and refusing an instruction asked by plaintiffs were assigned as errors.

Bozeman & Fewell, for appellants.

Notwithstanding the legal duty upon the city to remove the obstruction, and the admission of the city that it had knowledge of its existence, the court below yielding to and persuaded by the able and plausible argument of counsel for appellee, supported by ancient and "webbed over" authorities wholly inapplicable to this day of modern improvements and new doctrines, presented to the jury by instructions, as the law, the monstrous proposition "that if the plaintiffs maintained the obstruction in the city pipes, and they contributed to plaintiffs' property being injured, the plaintiffs cannot recover."

After the construction of drains and sewers, although originally this was a discretionary duty, yet, the obligation to maintain them in a safe and suitable condition is not of that character, and the city must perform duty in these respects or become liable for injuries suffered. A municipal corporation cannot in respect to the construction or maintenance of a drainage

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or sewerage system, especially in its discharge, create either a public or private nuisance, for the former it is subject to indictment, in some jurisdictions, and for the latter it will be liable for damages shown. In Williams' Municipal Liability for Torts this is stated: "It makes no difference by whom drain or sewer was constructed provided it appears the municipality had assumed and exercised control over it. Hence even though built by private individual, the municipality by adopting it to the use of its public is responsible for its proper maintenance as if constructed by it or its agents, citing: *Emery* v. *Lowell,* 104 Mass., 13; *Taylor* v. *Austin,* 32 Minn., 247; *Chalkley* v. *Richmond,* 88 Va., 402; *Schroeder* v. *Baradoo,* 93 Wis., 95.

As to what is proper maintenance see Williams' Municipal Liability for Torts, pp. 256 to 272.

A city which allows an obstruction to remain in a street (sewer or drain) for an unreasonable length of time is liable to the same extent as if it had placed the obstruction. *Senburn* v. *Evansville,* 40 N. E., 69, 23 Am. Dig., 2567, *et seq.*

As to the city's duty to keep in repair, etc., its drains and sewers, see: *Seifert* v. *Brooklyn,* 54 Am. Rep., 664, 10 Am. & Eng. Ency. L. (2d ed.), 220, 240, 239, 18 Am. St. Rep., 158, 68 Am. St. Rep., 92, 6 Am. St. Rep., 422, 56 Am. St. Rep., 245, 79 Am. St. Rep., 779, 29 Am. St. Rep., 730, 90 Am. St. Rep., 922.

We take it that the real defense of the city in this suit is on the idea that the property now is in the same condition as it was when bought by the plaintiffs, appellants. If this be true then the case recently decided by our supreme court on November 26, 1906, *Vicksburg* v. *Richardson, ante* 1, s.c., 42 So. Rep., 234, decides this point against the city. In that case it was contended that the property of Mrs. Richardson was in no worse condition when suit was brought than when she bought the property and that therefore she could not recover against the city. But the supreme court says: "The city officers were repeatedly notified of this, but took no steps

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to remedy the evil, etc. And the supreme court affirmed a judgment for Mrs. Richardson procured on a peremptory instruction. The supreme court in this last case cited with approval the case of *Chalkley* v. *Richardson,* 29 Am. St. Rep., 741.

"The authorities seem to be generally agreed that a city will not be liable for injuries caused to individuals by an obstruction in a public sewer, not placed there by its officials, nor by authority of the city, until after actual notice of such obstruction or until, by reason of lapse of time, notice may be presumed citing cases."

Neville & Wilbourn, for appellee.

Counsel for appellants seem to lay much stress upon the late case of *Vicksburg* v. *Richardson, ante* 1, s.c., 42 South., Rep., 234, and to be under the impression that the defense of appellee in the instant case is really predicated of the idea that the property is now in the same condition as it was when bought by appellants. In this they are mistaken. The *Richardson case* has no sort of application to the case at bar, nor are we contending that the continuation of the same conditions that existed before appellant's purchase would alone constitute a defense to the city. The *Richardson case* is easily differentiated from the case at bar. In the first place, Mrs. Richardson's suit was predicated of the city's permitting and sanctioning an unlawful and detrimental use of its gutters over her protest and after notice by third parties, a question not even remotely involved under the pleadings and facts in this case. The allegation about the obstruction by the cross-pipe in the manhole is that the city crossed the pipe through the manhole itself, and itself actively created and failed to remove the obstacle or obstruction in the manhole, which allegations were not sustained by the proof. Again, in the *Richardson case,* the only hope for a remedy by Mrs. Richardson was through the action of the city in preventing the unlawful acts of others; whereas in the instant case, appellants could themselves have remedied, and

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should themselves have remedied the conditions created by their predecessor in title and existing at the time of their purchase by having the sanitary sewer pipe, which crossed through the manhole and which connected their own premises with the city's sewer and which was entirely without default on her own part and wholly without remedy unless the city should intervene.

We do not see, therefore, wherein appellants can take comfort from the fact that the appellee knew that the sewer pipe was in the manhole. If appellee knew of its presence there and suffered it to remain after notice, not only have appellants not predicated their suit of such a theory, but in addition appellants themselves knew the sewer pipe was in the manhole and themselves suffered it to remain. Under the facts of this case, therefore, the knowledge of the city that the sewer pipe was through the manhole does not fix liability upon the appellee.

Nor can we see the relevancy of counsel's contention that Meyer, predecessor in title, who had the sanitary pipe put through the manhole connecting his premises with the main sewer of the city, was at the time this was done a member of the board of aldermen. Counsel seems to consider it conclusive upon the question of notice to the city. Surely it will not be contended that the act of the individual, Meyer, in this instance in connecting his private premises with the main sewer of the city was in any sense of the word an act of the city, for it was done in his private capacity for his private benefit and wholly aside from and disconnected from any of his duties as an alderman.

The theory of the law embodied in the instructions in this cause does not place any higher duty on anyone than the duty which has long rested upon all plaintiffs, namely, the duty to show that they have done all in their power to reduce or prevent their damages, and that the injuries of which they complain did not result from conditions known by them to exist and which they had equal opportunity themselves to relieve. *Dallas* v. *Cooper,* 34 S. W., 321; *Macon* v. *Small,* 108 Ga.,

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309; *O'Brien* v. *Worcester,* 142 Mass., 348; *Breuck* v. *Holyoke,* 167 Mass., 142; *Kosmak* v. *New York,* 53 Hun, 329; *Beafeld* v. *Verona,* 41 Atl., 651; *Fair* v. *Philadelphia,* 88 Pa. St., 309; *Flagg* v. *Worcester,* 13 Gray, 601; *Barry* v. *Lowell,* 8 Allen, 127; *Mills* v. *Brooklyn,* 32 N. Y., 489; 2 Dillon's Mun. Corp., pp. 935, 936; 24 Am. & Eng. Ency. L., p. 942; *Weis* v. *Madison,* 39 American Records, 135; Gould on Waters (2d ed.), secs. 261, 262, 270.

WHITFIELD, C. J., delivered the opinion of the court.

We have given this record the most careful examination, going over it repeatedly. The cause of action set forth in the declaration is chiefly the failure of the city to properly construct and maintain pipes of sufficient size to carry off the surface water accumulating in the manhole in front of the appellant's premises, though it is subsidiarily charged that the city had "negligently crossed through said manhole another pipe, and that this said cross-pipe caught filth, drift, etc., and thus stopped the flow of even the small quantity of water which was ordinarily accommodated by said pipes." We must look to the substance of things, get at the very right of the cause, not losing sight of justice by losing ourselves in a maze of technical speculations; and, so looked at, this declaration states the cause of action as we have put it. We must remark here that the instructions in the case for the most part show the greatest care and accuracy on the part of the accomplished circuit judge who tried this case, one of the ablest and most fearless of all the circuit judges who have ever adorned the circuit bench in this state. In all respects, save one, he seems to have correctly announced the law; and that error consisted in this misconception. His idea seems to have been, as shown in the two following instructions given to the defendant, that, if the predecessor in title of the plaintiff put the cross-pipe through the manhole, then the city was not liable for the damages which might follow therefrom, although it had been notified of the fact that this

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cross-pipe was a defect in the construction and maintenance of the manhole, and requested to rectify the trouble, and although the city had assumed and exercised control over the manhole, and, of course, the cross-pipe going through it.

The two instructions we refer to are as follows: "If the jury believe from the evidence that the overflows of which plaintiffs complain are occasioned by the sanitary sewer pipe connecting plaintiffs' premises with the city sewer, in the manhole of the drain in front of plaintiffs' premises, and that said sanitary sewer pipe was placed through said manhole by plaintiffs' predecessor in title, after the construction of said manhole, and that plaintiffs since purchasing the property have continued to permit said sanitary sewer pipe to remain through said manhole, then the jury will find for the defendant." "The court instructs the jury, for the defendant, city of Meridian, that if the overflow of plaintiffs' premises, of which plaintiffs complain, does not result from conditions created directly by the city, then plaintiffs cannot recover, and that if the jury believe from the evidence that the defendant laid its pipes and built its manhole in front of the premises of plaintiffs, and that said pipes and said manhole were not negligently constructed, and that the defendant did not turn through said pipes and manhole any more water than customarily and ordinarily flows naturally therein, and that afterwards plaintiffs' predecessor in title placed a sanitary sewer pipe through the said manhole, connecting the sewer of plaintiffs' premises with the main sewer of the defendant, and that plaintiffs' predecessor in title and plaintiffs have continued to permit said sanitary sewer pipe to remain through said manhole, and that the existence of said sewer pipe in said manhole occasions the overflow of which plaintiffs complain, then the plaintiffs cannot recover in this case, and the jury will find for the defendant." And the court refused to give the converse proposition for the plaintiffs, expressed in the following charge, which was refused to the plaintiffs: "The court charges the jury, for the plaintiffs, that it

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was the duty of the defendant city upon being notified of the condition of the sewer or manhole in controversy, if they shall find same insufficient, to have rectified or remedied the evil complained of, and the failure to do so makes the defendant liable, and the jury will find for the plaintiffs."

The facts, we think, plainly show that, although Meyer had the cross-pipe constructed as a sanitary pipe from his residence (afterwards sold to appellants) to the main sewer pipe of the city under Thirty-third avenue, nevertheless the city, certainly with full knowledge that it did cross through the manhole—not emptying into the manhole, however—and did so cross the manhole as to be opposite the outlet pipe, assumed control over the manhole and cross-pipe, and all connected with it, and knowing that this cross-pipe accumulated drift and other obstructive material, and thus prevented the proper flow of the surface water out through the outlet pipe, yet allowed this manifestly improper construction of the manhole and cross-pipe to remain unrectified, after full and repeated notice of the condition of affairs and request for repairing it. The principle is one abundantly supported by the authorities which we shall subjoin —that no matter who constructed the cross-pipe in the manhole, if the city assumed and exercised control over the manhole and the cross-pipe, and dealt with it as a part of its drainage system, the city is liable for any damages occasioned by such wrongful construction of the cross-pipe and the manhole, if it has been duly notified and fails to correct the situation. This is abundantly settled by the following authorities: *Emery* v. *City of Lowell,* 104 Mass., 13; *Taylor* v. *City of Austin,* 32 Minn., 247, 20 N. W., 157; *Chalkley* v. *City of Richmond,* 88 Va., 402, 14 S. E., 339, 29 Am. St. Rep., 730; *Schroeder* v. *Baraboo,* 93 Wis., 95, 67 N. W., 27; *Senhenn* v. *City of Evansville,* 40 N. E., 69, 140 Ind., 675,—all cited by counsel for appellant, and especially by the very recent case, not cited by counsel on either side, of *Hiram L. Hart* v. *City of Neillsville,*

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40 N. W., 699, from the Wisconsin supreme court, to be also found in 40 N. W., 699, 1 L. R. A. (N. S.), 952.

In the *Lowell case* it was held that if the city constructed and maintained a passage from the street down into a private drain from neighboring premises in such manner as in effect to adopt it—the passage—in connection with the drain as a common sewer, and by negligence in its construction or repair obstructed the drainage, it was liable. In the *Minnesota case* it was said: "It is not material to inquire when or by whom the sewer was originally constructed, as it is not disputed that the city had assumed control and management. It was, therefore, its duty to use reasonable diligence to keep it in proper repair." In the *Virginia case* it was said: "Where a person is permitted and aided by a city to alter the course of a sewer over which it has assumed control, it matters not by whom it was originally constructed, and when such alteration is negligently effected, so as to cause the water and filth to flow into the plaintiff's cellar, the city is liable." In *Senhenn* v. *City of Evansville, supra,* it was held, going further than necessary here, that a city, which allowed an obstruction to remain in a street for an unreasonable length of time, will be liable for injuries caused thereby to the same extent as if it had originally placed the obstruction in the street. And the case to which we last above referred (*Hart* v. *City of Neillsville*) is a very strongly reasoned case, fully supporting the appellant's contention. That court quoted the following, with approval, from 5 Thompson on Negligence, sec. 5876: "But, even if it were a good answer to make to the injured property owner that the city had made a mistake in its plan, yet it would not be so after the city had acquired a knowledge of the inadequacy of the plan and the injury inflicted thereby upon the property owner, since it would be its duty to abate the evil by changing its plan and rectifying its error." In that case the plaintiff had a basement walled up with stone, and he had a drain leading from his basement under the street in front of his property. The city constructed a sewer along

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the street for the purpose of draining the abutting property, and left an opening in said sewer to enable plaintiff to connect therewith his private drain. He did so, and his cellar was subsequently flooded, and it was objected that but for his private drain there would have been no damage; but the court held "that where, as a matter of right, a private drain is constructed, connecting private property with a main sewer through an opening left by the city therefor, the damages resulting to such property by accumulated sewage flowing from said sewer to said property are recoverable, and the mere circumstance that without such drain no such result would have happened will not save the municipality from liability for such damages."

It is not questioned by this record that the predecessor in title of the plaintiffs had the right to construct this sanitary pipe; and, even if it be conceded that he had no right to construct it through the manhole originally, yet if such sanitary pipe so crossed through the manhole is afterwards controlled by the city, in connection with the manhole, the city is as much responsible as if the cross-pipe had never existed. It was the plain duty of the city, after it was notified of the fact that the cross-pipe caught drift and filth, and so filled up the manhole in part, and obstructed most seriously the flow of the water through the eighteen-inch outlet pipe, to have that cross-pipe removed and the manhole properly reconstructed, so as to take off all the surface water flowing, in ordinary rains, into the manhole. See, also, the following authorities, and especially the masterly note of Mr. Farnham to *Johnson* v. *White*, 26 R. I., 207, 58 Atl., 658, in 65 L. R. A., 250; *Aurora* v. *Reed*, 57 Ill., 29, 11 Am. Rep., 1; *Jeffersonville* v. *Myers*, 2 Ind. App., 532, 28 N. E., 999; *Powers* v. *Council Bluffs*, 50 Iowa, 197; *Hitchins* v. *Frostburg*, 68 Md., 100, 11 Atl., 826, 6 Am. St. Rep., 422; *Parker* v. *Nashua*, 59 N. H., 402; *Houston* v. *Bryan*, 2 Tex. Civ. App., 553, 22 S. W., 231.

It is abundantly shown by the testimony in the record that the overflow of water is most serious over the plaintiff's prem-

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ises. The facts would indicate, as best we can gather them from the record, that there was originally a natural drainage through the plaintiffs' lot, and that that natural drainage, if it had been let alone, would have carried off all ordinary rainfalls. The city put in that drain piping, and it appears that that piping was not of capacity to carry off the ordinary rainfall. It the city substituted for the natural drainage, piping which was insufficient to carry off the usual rainfalls in ordinary rains, it would surely be liable, for the obvious reason that it would increase the overflow on the premises beyond what it would have been in its natural state. If the city undertook to substitute something for the drainage, it should have been a sufficient substitute, and adequate substitute. It is true that Mr. Meyer raised his house and filled up this ditch. It is also true that the city has diverted some of the surface water which in years past went through this manhole in front of the plaintiffs' property; but we think a fair view of the whole testimony makes it reasonably clear that the pipes connected with the manhole intended to carry off the surface water are inadequate, even as respects the present flow of surface water into the manhole. We would not, however, disturb the verdict under the very accurate instructions, save in one respect, on the ground that the testimony manifestly showed these pipes insufficient; but we are bound to hold the two instructions, above set out, given to the defendant, erroneously given, and the instruction, above set out, refused to the plaintiff, erroneously refused, because of the incorrect announcement of the law we have indicated above. It is for that reason alone that the judgment is reversed and the cause remanded.

We will add that we do not think the learned circuit judge erred in what he said in the hearing of the jury. It could not possibly have exercised any influence on them in the finding of their verdict. Indeed, it seems to have been made to cure what the circuit judge feared might have been some erroneous observations of his in the course of the trial—observations which he

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thought might influence the jury prejudicially against the plaintiffs. We refer to the opinion we have this day delivered in the case of *Fed Gray* v. *State, ante,* p. —, s. c., 43 South., 289, as to this assignment of error.

The judgment is reversed, and the cause remanded.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* KEYSTONE LUMBER COMPANY.

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[43 South., 605.]

CARRIERS. *Railroads. Railroad commission. Rules. Demurrage. Delayage. Powers.*

Under Code 1892, § 4291, giving the railroad commission power to fix charges and supervise persons owning or operating express, telegraph, telephone or sleeping car companies, and Laws 1898, p. 97, ch. 82, extending all laws authorizing the commission to supervise common carriers to car service associations:—

(*a*) The railroad commission had power to make rules as to reciprocal demurrage; and

(*b*) The rule of the commission is valid which provides that when cars are properly loaded and shipper's instructions given, the railroad company must immediately issue bills of lading to the shipper, making the company liable to a penalty of one dollar per day in the owner's favor for delay in starting the shipment, after twenty-four hours following the issuance of the bill of lading.

FROM the circuit court of Yazoo county.

HON. DAVID M. MILLER, Judge.

The lumber company, the appellee, was plaintiff in the court below; the railroad company, the appellant, was defendant there. From a judgment in plaintiff's favor for less than its demand, the defendant appealed to the supreme court, and the plaintiff prosecuted a cross-appeal.

The suit was to recover damages for the alleged unreasonable delay in the transportation of certain freight delivered to the

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defendant for shipment. The defendant filed a special plea denying liability for delay, for the reason that the order of the railroad commission of the state of Mississippi attempting to create delayage charges is unconstitutional and void: (1) For the reason that neither under the Code nor the statute law enacted since its adoption is said railroad commission given the power to legislate and fix on railroad companies either penalties or fixed charges; (2) that the order of the railroad commission is arbitrary and oppressive, fixing a penalty on a railroad company and ignoring entirely the element of actual damage to the shipper; (3) that the order of the railroad commission is unconstitutional and void under the constitution of the state of Mississippi and of the United States, because it practically attempts to authorize the taking of property of the railroad company without due process of law.

The cause having originated in the court of a justice of the peace, where no pleadings were required to be filed, no action was had on this special plea, and the trial was proceeded with. When plaintiff introduced evidence to establish its delayage claims, objection was interposed by defendant to all testimony tending to support such claims or to fix liability on the railroad company therefor, which objections were overruled by the trial court on the ground that delayage charges became due for delay in transportation of car-load lots, and that plaintiff was entitled to recover therefor, but the court below disallowed all claims for less than car-load lots, and so instructed the jury.

The following are the demurrage and delayage rules adopted by the Mississippi Railroad Commission, June 8, 1904, and effective June 18, 1904:

"Rule 1. Railroad companies shall, within twenty-four hours after the arrival of shipments, give notice by mail or otherwise to consignees of arrival of goods, together with weight and amount of freight charges due thereon, and on goods in car-load quantities said notices must contain letters or initials of the car, number of the car, and if transferred in transit, the

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number and initial of the original car, net weight, and the amount of freight charges due on same. No demurrage charge shall be made unless legal notice of arrival is given to consignee.

"Any railroad company failing to give such notice, and to deliver such freight at its depots or warehouses, or, in case of shipment for track delivery, to place loaded cars at an accessible place for unloading, within twenty-four hours after arrival, computing from 7 a. m. the day following the arrival, shall forfeit and pay to the consignee, or other party whose interest is affected, the sum of $1 per car per day or fraction of a day on all car-load shipments, and one cent per one hundred (100) pound per day or fraction thereof on less than car-load lots, with a minimum charge of five cents for any one package, after the expiration of said twenty-four hours.

"Rule 2. Legal notice referred to in these rules may be either actual or constructive. Where the consignee is personally served with notice of the arrival of freight, free time begins at 7 o'clock a. m. on the day after such notice has been given. Constructive notice referred to consists of posting notice by mail to the consignee: provided, however, that if, in any case, where notice of arrival is given by mail, the consignee will make oath that neither he, his agents, nor employes have received such notice, then no demurrage charges shall be made until after legal notice as above specified, is given.

"Rule 3. For all package freight not unloaded in depot or warehouse by railroad company within forty-eight hours, not including Sundays or legal holidays, computing from 7 o'clock a. m. on day following arrival, the railroad company may be subjected by the consignee to a charge for each day or fraction of a day that said freight remains in a car as follows: In less than car-load quantities, not more than one cent per 100 per day; in car-load quantities, not more than ten cents per ton of 2,000 pounds per day.

"All package freight unloaded in depot and warehouse, which

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is not removed by the owners thereof from the custody of the railroad company within forty-eight hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. on the day following the day of legal notice of arrival, may be subject thereafter to a charge of storage for each day or fraction of a day that it may remain in the custody of the railroad company, as follows:

"In less than car-load quantities, not more than one cent per hundred pounds per day.

"In car-load quantities, not more than ten (10) cents per ton of two thousand (2,000) pounds per day.

"When consignee resides more than three miles and within ten miles of the railroad station, five days' free time will be allowed.

"When consignee resides more than ten miles from the railroad station, seven days' free time will be allowed.

"Rule 4. Loaded cars, which by consent and agreement between the railroad and consignee, that are to be unloaded by consignee, such as bulk meat, bulk grain, hay, cotton seed, lumber, lime, coal, coke, sand, brick, stone, and wood, and all cars taking track delivery, which are not unloaded from the cars containing same within forty-eight (48) hours (not including Sundays or legal holidays), computed from 7 o'clock a. m. of the day following the day legal notice of arrival is given, and the car or cars are placed accessible for unloading, may be subject thereafter to a charge of demurrage of one dollar per car for each day, or fraction of a day, that said car or cars remain loaded in the possession of the railroad company, it being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage; that, when the period of such demurrage charges commence, they are to be placed accessible to the consignee for unloading purposes, on demand of the consignee: provided, however, that if the railroad company shall remove such car or cars after being so

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Statement of the case.

placed, or in any way obstruct the unloading of the same, the consignee shall not be chargeable with the delay caused thereby: provided, further, that when any consignee shall receive four or more cars during any one day loaded with lumber, laths, shingles, wood, coal, coke, lime, ore, sand, or bricks, and all cars taking track delivery, the said cars in excess of three shall not be liable to demurrage by any railroad company until after the expiration of seventy-two hours.

"When consignee resides more than three miles and within ten miles of the railroad station, five days' free time will be allowed.

"When consignee resides more than ten miles from the railroad station seven days' free time will be allowed.

"Rule 5. When consignors ship goods to order, but express in their bills of lading the name of a person at destination to notify, it shall be the duty of the railroad company to give legal notice to such party in the same way and under the same rule as if the shipment had been made to him. But, when consignors do not comply with this condition, the notice may be addressed by mail to the consignee at point of delivery, and demurrage will begin as in other cases of notice by mail, and the mailing of such notice shall be sufficient legal notice, whether the consignee actually receives the same or not.

"Rule 6. Railroad companies are authorized to store such property in public warehouses at the expense of the owner, if same is not removed before demurrage charges attach: provided, that storage charges on such freight shall not exceed the demurrage allowed under their rules.

"Rule 7. Whenever the weather during the period of free time is so severe, inclement, or rainy that it is impracticable to secure means of removal, or where, from the nature of the goods, removal would cause injury or damage, such time shall be added to the free period, and no demurrage charges shall be allowed for such additional time.

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Statement of the case.

"This rule applies to the state of the weather during business hours.

"Rule 8. Railroads shall not discriminate between persons or places in storage or demurrage charges. If a railroad company collects storage or demurrage of one person under the demurrage rules, it must collect of all who are liable. No rebate, drawback, or other similar device will be allowed.

"If demurrage is collected by a railroad company at one point on its line, it must collect at all of the places on its line, of those liable under the rules of this commission; provided, that the commission shall hear and grant applications to suspend the operation of this rule whenever justice shall demand this course.

"Rule 9. Whenever a shipper makes a verbal or written application to a railroad company for car or cars to be loaded with any kind of freight embraced in the tariff of said company, stating the article and destination, the railroad company shall furnish same within five days from seven (7) o'clock a. m. the day following such application. Or when the shipper making such application specifies a future day on which he desires notice thereof, computing from 7 o'clock a. m. the day following such notice, the railroad company shall furnish such car or cars on the day specified; provided, that if the movement of cars is suspended on account of accident or other cause not within the power of the railroad company to prevent, such period shall be added to the five days' time allowed in this rule.

"For failure to comply with this rule the railroad company shall pay to the shipper a delayage charge of $1 per car per day, or fraction thereof, after the expiration of free time, upon demand in writing in thirty (30) days thereafter.

"Rule 10. Cars detained or held on account of shipper's failure to load, or for want of proper shipping instructions, or by reason of improper loading, when loading is done by ship-

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per, shall be subject to demurrage charges of $1 per car per day or fraction thereof, so detained.

"Shipper must be notified as soon as cars improperly loaded are received from him, in which case demurrage shall begin with notification.

"Likewise when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried forward within twenty-four (24) hours thereafter, said railroad company shall be liable to said shipper for the payment of $1 per car for each day, or fraction of a day, that said car or cars are thus detained or held.

"Likewise, where cars are detained in transit by being switched to some track between point of shipment and destination, $1 per car will be charged for each day or fraction of a day of delay thus caused, and no free time will in such case be allowed.

"Twenty-four hours' free time will be allowed for delay at the end of the freight division on which shipments originate, and a like period of twenty-four hours' free time for delivery to connecting lines on joint shipments, and a charge of $1 per car delayage shall be charged for each day or fraction thereof in excess of twenty-four hours same is held at such freight division or connecting point.

"Rule 11. No other charges shall be made for storage or demurrage, except as provided in the foregoing rules, and, if a railroad company is indebted to a shipper or consignee for delayage, then a claim for demurrage shall be offset by a claim for delayage.

"Rule 12. These rules apply only to places where car service rules are in operation.

"Rule 13. When both cars and track are owned by the same party, no charge for demurrage will be made. When private cars are detained on the tracks of other firms or individuals, or on the tracks belonging to or operated by members of this

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association, or cars belonging to the latter upon private tracks, the established charge will apply.

"Rule 14. At junction points, where consignee's side track is located on one road and cars are received by a connecting road, it shall be the duty of the said connecting road to switch and deliver such cars to the road on which consignee's side track is located within twenty-four hours from 7 o'clock a. m. after the time of arrival, and of the road on which consignee's side track is located to switch and place such cars on said side track within twenty-four hours from 7 a. m. after the time of delivery by the receiving road. Failure in this regard shall subject either road to delayage charge of $1 per car per day or fraction thereof; provided, this shall not prevent the charge and collection of established or reasonable switching charges by the road on which said side track is located; and provided, further, that if said side track, without fault of the railroad, is blocked so that delivery cannot be made, the time it remains blocked shall be added to the free time specified herein.

"Rule 15. In all computation of time under these rules, Sundays and legal holidays are to be excluded."

Mayes & Longstreet, for appellant.

It needs little explanation to point out the essential difference between a demurrage charge and a so-called delayage penalty. This honorable court in two very notable decisions, has sustained the right to demurrage, and approved the purpose of the enforcement of demurrage charges. We deem it unnecessary to advert here to the principles which control in the assessment and collection of demurrage charges, and of the usefulness of car service associations along this line. These questions are extensively considered, and the reasons elaborately stated in *George* v. *New Orleans & N. E. R. R. Co.,* 82 Miss., 710, s.c., 35 South. Rep., 193; *Yazoo, etc., R. R. Co.* v. *Searles,* 85 Miss., 520, s.c., 37 South. Rep., 939.

The right in railroad companies to charge and collect de-

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murrage exists independently of statutes. It is founded on the general principle of law that a warehouseman is entitled to charge for storage afforded and the liens of the railroad company for such charges are likened unto the liens which protect warehousemen.

In addition to this, the bills of lading stipulate as a part of the contract of affreightment, for demurrage charges and liens.

How different, however, is a delayage charge so called in its nature and operation; the demurrage charge is supported because something of value has passed from the railroad company to the consignee; that is the use of the car for storage purposes, but a delayage charge is a pure penalty attempted to be fixed on the railroad companies for the alleged fault of unreasonable delay in transportation without regard to the question of actual damage and additional to all claims for compensatory damages which are recoverable in proper cases.

In case of delay there is no valuable consideration passing from the consignee to the railroad company, no use or benefit from the possession of the commodity.

Our objection to the enactment by the railroad commission of any delayage charges, such as the charges and penalties provided for by said rules 9 and 10, are:

1. The railroad commission of Mississippi has no power under the law to create by legislation originating with it rights in consignees or shippers to demand penalties for freight delayed in transit or for actual damages occurring to freight in transit, and, therefore, all orders in the attempted enactment by that honorable body of such regulation are utterly void.

It will be observed that the right of a railroad company to demand demurrage for cars unnecessarily delayed and held for storage purposes, exists in railroad companies independently of statutes of states, or orders of railroad commissions. It exists under the principles of the common law, and is based on the idea universally recognized by the courts of the United States, that if the consignee delays a car and uses it for stor-

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Brief for appellee.

age purposes, the railroad companies have rights to compensation, and liens to secure payment for this use, akin to the rights and liens of warehousemen.

But no right exists, at common law or statute, in a consignee or shipper except to claim actual damages. If a carrier should do any wrong or fail in any obligation to a shipper or consignee, the law affords speedy and ample redress. But it will be observed that the commission did not provide that the penalty which they fixed should be accepted by shipper or consignee in satisfaction of actual damages. Consignees desire still to retain all their rights to sue for actual damages and the charges the commission attempted to enact gave rights additional to compensatory damages. By whatever name these charges may be styled, it is apparent that they are in the nature of pure penalties or fines which this commission has attempted to impose on the carrier.

If no right exists at law in a shipper or consignee to claim and to recover anything except actual damages they may have sustained by the wrongful actions of the carrier, and if he cannot recover penalties like those provided for without an order of the railroad commission, it is apparent at a glance, and needs no argument to show, that if they can claim these damages only after the commission makes an order allowing and fixing the penalties, then the order of the commission would create in a shipper or consignee the right to demand a penalty.

The order of the commission is the source and measure of the right to penalties and charges.

It is perfectly manifest that the railroad commission in order to create such a right must have specific and ample power to enact such legislation under the constitution and the laws of the state of Mississippi.

Henry, Barbour & Henry, for appellee.

Only a part of one of the rules fixed by the Mississippi railroad commission is involved in this case—not rules 9 and 10—

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as distinguished counsel on the other side erroneously assert in their very able presentation of appellant's side of the controversy. The part involved is the following from rule 10: "Likewise when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried within twenty-four hours thereafter said railroad company shall be liable to said shipper for the payment of $1 per car for each day, or fraction of a day that said car or cars are thus detained or held."

The act upon which the validity of that part of the rule quoted must stand is ch. 82, p. 97, acts of Mississippi legislature of 1898, as follows: "That all laws, acts and parts of acts giving authority to the railroad commission to supervise common carriers shall also apply to car service associations or other associations governing or controlling cars or rolling stock of railroads at whatever place they do business in this state, and the same penalty fixed by law for disobeying the mandates of the railroad commission shall apply to the car service associations as well as to other carriers."

Manifestly, the railroad commission, in adopting the rules of June 8, 1904, effective June 18, 1904, were acting under the above law. It is also equally manifest that the rules were adopted with reference to the Car Service Association operating in Mississippi, and were deemed necessary for the efficient supervision of that association. It is certainly time (see rule 12) that the rules apply to places where car service rules are in operation.

Now, let us inquire for a moment the purpose of the creation of car service associations, very beneficent organizations, as the courts truly affirm. In *Yazoo, etc., R. R. Co.* v. *Searles,* 85 Miss., 556, s.c., 37 South. Rep., 939, the court on this subject tersely remarks: "The main end and purpose of their existence is to prove the benefit to *consignor, carrier* and *consignee* by *expediting* the *transportation of freight, facilitating*

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its delivery and insuring prompter and more satisfactory service by and for all alike."

It is therefore a mistake to assume as learned counsel seem to do in their brief, that their chief end is to provide remuneration to railroads on account of storage. The demurrage allowed is but one of the means toward the end for which they were called into being.

Learned counsel fall into another error when they say that "by the act of February 11, 1898, the legislature gave the railroad commission the power to regulate and supervise car service associations and other associations controlling rolling stock, and made car service associations, *insofar as the charges which they would make* subject to the control of that honorable body. But that act only gives the commission the power to regulate the charges which might be preferred by car service associations." The erroneous conclusion of counsel is in the part italicized. The legislature committed to the railroad commission full and complete power to regulate and supervise car service associations to effectuate the purposes for which they were organized. Such car associations have no power to fix demurrage charges. But the charges are fixed by the commission, and then the duty of the car service associations in this regard is to assess the charges. Thus speaks the supreme court in the *Searles case,* p. 556: "They are in no wise connected with the internal management, or financial affairs, or corporate policy of any railroad, having not even power of fixing demurrage charges which it is their duty to assess."

Again, on page 543 of the *Searles case,* referring to the act of 1898, the court says: "Acting under the power thus vested in it, the railroad commission adopted and promulgated certain rules in reference to demurrage charges, regulating the amount which could be imposed, and setting out in detail the circumstances under which they might rightfully be levied, and then clothed the associations with authority to collect in all proper cases. . . . It should be observed that these rules

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fixing penalty for undue detention of cars were not devised for the benefit of the railroad companies alone, but were framed by the state railroad commission, a tribunal charged by law with the duty of supervising all common carriers for the benefit of the public at large."

Again, on page 544: "Car service associations are simply agencies employed by railroad companies to insure prompt, accurate and impartial assessing of demurrage; but in each instance it is assessed in favor of the railroad entitled to it, and it is collected by that railroad, sometimes by the car service association of which it is a member, sometimes by other of its various employes, according to the custom of the railroad in reference to its collection."

Those citations show that the railroad commission is not called upon to act under the law of 1898, so as to benefit any railroad or railroads, but the central idea controlling them is the general public good—expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service." The benefit to the railroad is an incident.

Keeping this guiding star in mind, the solution of the question in this case becomes easy.

The "delayage rules" so called, are but an extension of the system originally devised to more fully carry into effect the objects, ends and aims of the car service associations. They are an endeavor to complete the scheme—to accomplish the great desideratum of keeping the rolling stock under control, moving, ever going on. In this, the public good is the chief end. The railroads are interested, so are the consignor and consignee of freight—each and every one, collectively and individually. In any given case the railroad having the charges to pay might object, but the enforcement of the rules to carry out the purposes involved, might be to the good of even every other railroad in the car service association, in that it would insure the releasing of cars speedily, and enable them to send

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them on their grinding mission of putting money in their purses.

Theoretically, the car service association looks after the delayage for the shipper, just as theoretically it looks after delayage of cars (or demurrage), for the various railroads; practically, the shipper looks after the matter where his interest is, and the several railroads do likewise where their interests are.

But counsel say that there is no consideration moving from the shipper to the railroad. None is necessary, but as a matter of fact it is well known that delay in forwarding shipments greatly injures the shipper, and this is a consideration. An instance is given in the present case where the appellee lost the trade of a customer because of delay in shipment by appellant.

Argued orally by *J. C. Longstreet,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The part of the rules of the railroad commission under review here is just this part of rule 10: "Likewise when cars are properly loaded, and shipping instructions given, the railroad agent must immediately issue bills of lading therefor; and if said car or cars are detained or held, and not carried forward within twenty-four hours thereafter, said railroad company shall be liable to said shipper for the payment of $1 per car for each day, or fraction of a day, that said car or cars are thus detained or held." This part of this rule establishes what is well known now as the right to make reciprocal demurrage charges. It is insisted by the appellant that the railroad commission had no power to make this rule. There is no question of interstate commerce even remotely involved in this case. The act authorizing this rule is ch. 82, p. 97, of the acts of 1898, which provides as follows: "That all laws, acts, and parts of acts giving authority to the railroad commission to supervise common carriers shall also apply to car service associations, or other associations governing or controlling cars or

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rolling stock of railroads, at whatever place they do business in this state, and the same penalty fixed by law for disobeying the mandates or orders of the railroad commission shall apply to the car service associations as well as to other carriers." The rules in question (a copy of which is attached to the record and which the reporter will set out in full), were adopted June 8, 1904, to be effective June 18, 1904, and the rule here assailed was evidently adopted by the commission under the authority of the said statute of 1898, *supra.* It is also plain, from the language of the rules, that they were adopted with reference to car service associations operating in Mississippi, and not elsewhere, and were deemed necessary for the proper intrastate supervision of such car service associations.

It is said that the railroad commission has no power to fix charges known as "reciprocal demurrage charges." In § 4291 of the Annotated Code of Mississippi of 1892 it was provided that the commission "may fix all charges and shall supervise and regulate all persons, etc., who may own or operate express, telegraph, or telephone and sleeping car companies." Six years afterwards the act of 1898, above referred to, was passed. Eight years after that sec. 4843 of the Mississippi Code of 1906 inserted after the words "sleeping car companies," brought forward from § 4291 of the Code of 1892, the following words: "Car service associations, or other associations governing or controlling cars or rolling stock of railroads, etc."—incorporating, in other words, the provisions of the act of 1898, *supra,* in § 4843 of the Code of 1906 as to the supervision of car service associations. There can be no fair and rational construction of these statutes denying to the railroad commission the power to make rules as to reciprocal demurrage. There is no merit in the contention that the commission could only fix these charges after the car service association had first compiled the charges and handed them to the commission; in other words, that the commission could not originate the charges. Car service associations have never by

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any law been required to submit any charges to the railroad commission on this subject. Even if such requirement had been made, however, it is far too narrow a construction of the beneficent powers intrusted in this matter to the railroad commission to hold that that commission is without power itself to originate the charges.

We have heretofore said that no question of interference with interstate commerce is presented in any wise by this record. The case of *Atlantic Coast Line Ry. Co.* v. *Commonwealth*, 46 S. E., 911, 102 Va., 599, may be usefully consulted in respect to this contention. The record, however, here presents no such question. It is certainly immaterial whether the commission in Virginia was a constitutionally created department of government, or, as in Mississippi, a legislatively created commission. The method of creation is one thing. The power given to it is another.

We considered this subject of car service associations and their right to impose demurrage charges in *Y. & M. V. R. R. Co.* v. *Searles*, 85 Miss., 556, 37 South., 952, 68 L. R. A. 715. We said there: "The main end and purpose of their existence is to prove a benefit to the consignor, carrier, and consignee by expediting the transportation of freight, facilitating its delivery, and insuring prompter and more satisfactory service by and for all alike." Let the words "for all alike" be especially noted. Again, at p. 556 of 85 Miss., p. 952 of 37 South. (68 L. R. A., 715), we said: "They [the car service associations] are in no wise connected with the internal management, or financial affairs, or corporate policy, of any railroad, having not even power of fixing demurrage charges, which it is their duty to assess." Again, on p. 543 of 85 Miss., p. 947 of 37 South. (68 L. R. A., 715), we said: "Acting under the power thus vested in it, the railroad commission adopted and promulgated certain rules in reference to demurrage charges, regulating the amount which could be imposed, and setting out, in detail, the circumstances under which they

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might rightfully be levied, and then clothed the association with authority to collect in all proper cases. It should be observed that these rules fixing penalties for undue detention of cars were not devised for the benefit of the railroad companies alone, but were framed by the state railroad commission, a tribunal charged by law with the duty of supervising common carriers for the benefit of the public at large." These quotations ought certainly to make it plain that the right of car service associations to assess reasonable demurrage rates, subject to the supervision of the railroad commission, was not maintained by this court for the benefit of the railroad companies, or the car service associations, of the state, but for the benefit of the public alone.

Much is said in the brief of learned counsel for appellant about a supposed distinction between reciprocal demurrage charges, which are characterized as fines and penalties, and demurrage charges which are said to be rightfully imposed by the car service associations under the common-law doctrine of a warehouseman's right to a lien for warehouse charges; and it is earnestly insisted that, without any action of the railroad commission approving demurrage charges, they would be maintained because of this common-law doctrine, and that thus the right of the car service associations to impose demurrage charges exists independently of any statute of the state, or of any action of the railroad commission, but that the right of the railroad commission to fix reciprocal demurrage charges cannot be supported on any common-law doctrine, that there is no lien for them, etc. It will be noted that, on p. 543 of 85 Miss., p. 947 of 37 South. (68 L. R. A., 715), in the *Searles case,* this court characterized the charges for demurrage as "penalties for undue detention of cars," and says they were "devised"—that is, by law—not for the benefit of railroad companies, but for the "benefit of the public at large." It is very ingenious, doubtless, to find other and collateral support for car service charges for demurrage in the common-law doctrine

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as to the right of warehousemen to a lien on the goods in the warehouse for storage, likening rather fancifully, as it seems to us, the ever-moving railroad car to the stationary warehouse. However sound this may be, in the absence of any statute, when the legislature has acted and dealt with this whole subject-matter of demurrage and reciprocal demurrage, authorizing the railroad commission to fix charges for demurrage and charges for reciprocal demurrage, both exclusively in the interest of the public at large, and neither with the slightest purpose of benefiting either the shipper or the consignee in any particular case, it is far too narrow a view to take of such wholesome and beneficent legislation to base support of its action exclusively upon any common-law theory. If there had been no common-law warehouse lien theory, the commission would, undoubtedly, under the legislative authority, have had the right to impose demurrage charges; and, if so, undoubtedly it had the converse, and necessarily correlated, power of imposing reciprocal demurrage charges. The purpose of all these charges is to benefit the public at large. On the one hand, the railroad commission, in imposing demurrage charges, had in view the purpose of requiring cars to be unloaded by consignees with all reasonable dispatch and delivered back to the railroad companies that they might go again into the traffic business to haul other freight of other consignees; and, on the other hand, the object of the railroad commission in imposing reciprocal demurrage charges was to compel the railroad companies, conversely, with the same end in view, to move cars, when loaded, with all reasonable dispatch to consignees, in order that they might, when unloaded, be promptly returned to the carrying of the traffic of the country. The purpose was to keep in constant, rapid movement all the cars railroad companies have, the country over, in service everywhere, on their own lines and interchangeably on other lines, so that the traffic of the country should proceed expeditiously, and the things

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transported by freight cars all over the land be promptly everywhere delivered.

In twenty states reciprocal demurrage measures are pending or have been enacted. Nearly all the organizations in the country representing large shippers have asked for reciprocal demurrage. It would correct many of the most serious defects from which the country is now suffering. The law of reciprocal demurrage is founded in the soundest common sense and the highest spirit of equity. If such laws are rigorously enforced, we will hear no longer of the freight congestion that has been so prevalent throughout the past winter, of thousands of empty cars standing unused in railroad yards in one section of the country, and coal famines in the other for the want of cars. Reasonable reciprocal demurrage rates, fairly enacted and justly and impartially enforced, will result in a quickened traffic the country over, in a just recognition on the part of the railway corporations of the land of what they owe in prompt freight schedules and an abundant supply of cars to the public at large, and in an equally just recognition on the part of the public of their duty promptly to unload traffic borne to them in cars, and send such empties back to aid in further traffic.

We think the action of the court below was correct in every particular, and the judgment is affirmed.

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Statement of the case.

MARGARET FORD BROWN *v.* TURNER BROWN.

[43 South., 178.]

EQUITY JURISPRUDENCE. *Mortgages. Satisfaction. Subrogation.*

A party to a void marriage who, honestly believing that he is the husband of the other party thereto, on her verbal promise to convey him a half interest in the property, satisfies a mortgage on her land, is a mere volunteer and not entitled to be subrogated to the rights of the mortgagee.

FROM the chancery court of Washington county.

HON. PERCY BELL, Chancellor.

Turner Brown, the appellee, was complainant in the court below, and Margaret Ford Brown, the appellant, was defendant there. From a decree overruling the demurrer of defendant to the bill of complaint, defendant appealed to the supreme court.

The complainant, Turner Brown, filed a bill in chancery against Margaret Ford Brown, wherein he alleged that he had married her in Washington county in 1899 and had lived with her on her premises for six years continuously, when she left him, and moved to Memphis, Tennessee, to live; that at the time of his marriage with her, she fraudulently represented to him that she was unmarried and legally capable of entering into a marriage contract under the laws of this state; that at the time of his marriage with her, she owned certain real estate in Greenville, which was mortgaged to the extent of $600, practically its entire worth; that, after the marriage, believing himself to be her husband, and desiring to provide a homestead for himself and his supposed wife, the defendant, he proceeded with diligence and at her special instance and request to work out and pay off the mortgage indebtedness with his own funds and proceeds of his labor, she promising to convey him a half interest in the property. The bill further alleged that at the time of

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his formal marriage with her she had a husband named Thomas Ford, having never been divorced from him, and her marriage with complainant was not in ignorance of law on her part, but for the fraudulent purpose of having her property redeemed from the mortgage through his labor and money; that, although the mortgage has been thus fully paid, she has declined to convey to him any interest whatever in the realty; has left him to go to her husband, Thomas Ford, in Memphis; and, on the ground that her marriage with complainant was illegal, has instituted proceedings for its annullment in Washington county against complainant. The bill further recited that as a result of all the foregoing, complainant finds that he is to be without a wife, and all of the money he has paid on the land, and his equitable interest therein, unless equity comes to his relief. The bill prayed for an equitable lien on the land by way of subrogation for the full amount paid out in settlement of the mortgage by complainant, and that the land be sold to satisfy the same.

The defendant, Margaret Ford Brown, demurred to the bill, on the ground that the allegations therein did not authorize subrogation, and that there was no equity on the face of the bill.

Campbell & Cashin, for appellant.

The bill shows that the appellee, Turner Brown, supposing himself to be the legal husband of the appellant, proceeded to work out and pay off a mortgage indebtedness upon appellant's land, because of his desire to provide a home for himself and her, and because of her promise to convey him a half interest in said property. The bill does not state whether the appellant's alleged promise of a half interest was verbal or written, but this is immaterial, inasmuch as the bill does not seek to enforce the specific performance of any promise on the part of appellant to convey a half interest in the property to appellee. If the promise was made in writing, the bill does not

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seek to enforce it; and if it was a verbal promise, of course it could not be enforced. Appellee only seeks to be subrogated to the mortgage which he alleges was paid off by him.

Nor does the bill allege that any agreement existed between appellant and appellee that the mortgage should be kept alive for appellee's benefit, nor that there was any promise or agreement on appellant's part to repay to appellee the money he paid on the mortgage indebtedness. The bill merely alleges that the inducement leading appellee to pay off the mortgage debt was to provide a home for himself and appellant, and to receive a half interest in the property.

We think the facts in this case bring it fairly within the rule announced by this court in *Berry* v. *Bullock,* 81 Miss., 463, s.c., 33 South., 410. The bill does not make out a case for legal or conventional subrogation. It is framed expressly on the theory that the appellee paid off the mortgage because of his desire to provide a home for himself and appellant, and because of appellant's promise above mentioned. No assignment of the mortgage to appellee is alleged in the bill; but, on the contrary, the bill distinctly alleges that the mortgage was satisfied and discharged.

Appellee must be held to have carved out his own security, and paid off the mortgage debt, not on the hope of any subrogation, but on the hope of securing a half interest in the property.

In the case of *Ætna Insurance Co.* v. *Middleport,* 124 U. S., 534, cited in the opinion of this court in *Berry* v. *Bullock, supra,* the United States supreme court said, "The doctrine of subrogation in equity requires, (1) that the person seeking its benefit must have paid a debt due to a third party before he can be substitued to that party's rights, and (2) that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in case of sureties, prior mortgages, etc. The right is never accorded

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in equity to one who is a mere volunteer in paying a debt of one person to another." In *Sanford* v. *McLean,* 3 Paige, 122, cited by the United States supreme court in *Ætna Insurance Co.* v. *Middleport, supra,* Chancellor WALWORTH said, "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay to protect his own rights, that a court of equity substitute him in the place of the creditor as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

In Sheldon on Subrogation, sec. 240, it is said, "the doctrine of subrogation is not applied for a mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any right of property of his own."

In *Suppiger* v. *Garrels,* 20 Bradwell, Ill. App., 625, it is said, "Subrogation in equity is confined to the relation of surety and guarantor; to cases where a person to protect his own junior lien is compelled to remove one which is superior; and to cases of insurance. One who is under no legal obligation to pay the debt, is a stranger, and if he pays the debt, he is a mere volunteer."

As stated in *Berry* v. *Bullock, supra,* "subrogation is not a universal remedy for parties who have lost their money. It has its sphere of relief plainly limited by its nature. It is the creature, not of contract, but of equity. But equity cannot enforce subrogation on parties. The case must be one which on its facts fits perfectly in with the nature and purpose of subrogation."

Appellant was under no necessity to pay off the mortgage. He had no interest to protect by so doing, except such as

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Brief for appellee.

might rest on the promise of appellant to convey to him a half interest in the property; and if she failed to convey, in accordance with her promise, that, in itself, does not entitle the appellee to subrogation.

Hugh C. Watson, for appellee.

Appellee's bill was maintainable on three grounds:

1. Because of appellant's promise that if appellee would pay off the mortgage she would convey to him a half interest in the property. Although this promise, being verbal, would not be enforceable by bill for specific performance, it would be, and was, a sufficient promise upon which to rest the equitable relief of subrogation. *Allen* v. *Gaylor,* 24 South. Rep., 512; *McMillan* v. *Gordon,* 4 Ala., 716; *Fuller* v. *Hollis,* 57 Ala., 430.

2. The bill was maintainable because the husband, on marriage to the wife, had vested in him a peculiar estate or interest in the property in question. This estate is very much like the estate of curtesy at common law. While, under the statute law of this state, the husband and wife are permitted to own separate property, the homestead is conserved to both of them by the statute, and each is made a statutory heir of the other. The estate of curtesy is of course similar to the estate of dower, in contemplation of law. And the courts have held that the holder of a dower interest will be subrogated to mortgages that may be retired by the holder of such interest. Sheldon on Subrogation, secs. 51, 104, 114; *Becker* v. *Carey,* 36 Atl., 770.

3. The bill was maintainable on the ground of fraud practiced upon the appellee. A fraud was perpetrated upon him by his being led to believe that appellant could and did lawfully marry him, whereby he was induced to put his money into the retirement of the mortgage. A second fraud was perpetrated upon him by appellant when she promised to convey to him an interest in the property if he would redeem it from

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Statement of the case.

the mortgage, which conveyance she refused subsequently to execute.

WHITFIELD, C. J., delivered the opinion of the court.

The marriage of the parties was null and void. The appellee was an entire stranger and pure volunteer. He had no interest whatever in the property, and all his payments were made as a simple volunteer. The case was precisely within the principles announced in the case of *Berry* v. *Bullock,* 81 Miss., 463, 33 South., 410, and the authorities therein cited.

The decree is reversed, and demurrer sustained, and the bill dismissed.

JOSIAH T. SHURLEY *v.* STATE OF MISSISSIPPI.

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90 834

[43 South., 299.]

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Amendment. Code* 1906, § 1509.

Where the prosecuting attorney, without leave of court and in disregard of Code 1906, § 1509, providing how indictments may be amended, changed the name of the party alleged to have been assaulted in an indictment for an assault with intent to kill and murder, defendant's motion to quash the amended indictment, the facts being shown, should have been sustained and its denial by the trial court constitutes reversible error.

2. SAME. *How amendments made.*

An indictment can only be amended as provided by Code 1906, § 1509, regulating the subject and requiring an order on the minutes of the court specifying the amendment.

FROM the circuit court of Yazoo county.

HON. DAVID M. MILLER, Judge.

Shurley, the appellant, was indicted and tried for an assault with intent to kill and murder; was convicted of and sentenced for a mere assault and appealed to the supreme court.

The facts touching the amendment of the indictment upon

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Brief for appellant.

which the case was decided by the supreme court appear from the opinion of the court.

E. R. Holmes, for appellant.

1. The amendment of the indictment was not a formal amendment but was an amendment as to a matter of substance which could not and cannot be made by the court or by the grand jury. To change the name of the party whom Shurley was charged with having assaulted was equivalent to changing the identity of the offense. This not being a case of one person with two names, but two persons with different names, both of whom were before the grand jury as witnesses, both of whom were present at the scene of the difficulty, and participants therein. Identity of name is not essential but identity of offense is.

2. At the common law an indictment once filed cannot be withdrawn for amendment (43 Ark., 91), and there is no provision under our law by which an indictment can be amended by the grand jury, after having once been filed.

3. There was no order of court directing the indictment to be amended and the nature of the amendment is such that no order of court could be entered directing it to be amended on a new trial.

4. If the state contends that it is a new indictment, then we reply, it has never been signed by the foreman, and has never been marked "filed." True, the clerk marked the indictment "refiled," but he did not mark it "filed," and it was never signed by the foreman. The action of the clerk in marking the indictment "refiled" instead of "filed" shows that it was treated as the original indictment amended, and not as a new indictment for a different offense. If the indictment is to be treated as a new indictment it must have every essential ingredient of a new indictment. It should have been presented to the court by the foreman of the grand jury, in the presence of at least twelve of such jurors, including the foreman, and should have

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Brief for appellant.

been marked "filed." If you treat this as a new and not an amended indictment, it never has been marked "filed." As the term of the court has expired at which the indictment was presented, it cannot be marked filed and treated as a new indictment. *Stanford* v. *State,* 76 Miss., 257, s.c., 24 South., 536.

The authority of our own court is not wanting to support these propositions. *Blumenberg* v. *State,* 55 Miss., 528; *Miller* v. *State,* 53 Miss., 403.

After an indictment has been once presented and filed, there are only five instances under our practice wherein it may be amended as to matter of form. It can never be amended as to matter of substance.

The first is § 1353 of the Code of 1892, providing for amendment in case of a dilatory plea; it is as follows:

"An indictment or information shall not be abated by reason of any misnomer or dilatory plea; but in such case, the court shall forthwith cause the same to be amended according to the proof, and shall proceed as though such plea had not been pleaded; and an indictment shall not be held insufficient for want of, or imperfection in the addition of any defendant."

The second is sec. 1354 of the Code of 1892, providing that all objections to an indictment for a defect appearing on the face thereof shall be taken by demurrer, and that the court for any formal defect may cause the indictment to be forthwith amended.

The third is sec. 1355 providing that all objections to an indictment for any defect dehors the face thereof, presenting an issue to be tried by the court, shall be taken by motion to quash, and that the right to amend shall be as in the last preceding section, to-wit, for any formal defect.

The fourth is sec. 1357 providing for the insertion in an indictment of the same of any defendant who has been charged as a person unknown to the grand jury.

The fifth is sec. 1435 providing for an amendment when-

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Brief for appellant.

ever on the trial there shall appear to be any variance between the indictment and the proof, if the court shall consider such variance not material to the merits of the case.

There is no statute under our law authorizing the amendment of an indictment by the grand jury. Up to the time of the adoption of the Code of 1880, the grand jury were authorized by statute to amend an indictment. See § 2794 of Code of 1871, which is as follows:

"All indictments must be presented to the court by the foreman of the grand jury, in the presence of at least twelve of such jury, including such foreman, and must be marked "filed" and such entry dated and signed by the clerk, and may, with the consent of such grand jury or of the court, be amended at any time during the term at which it was found, or afterwards by the consent of the defendant alone, with the permission of the court."

This section was amended under the Code of 1880 (§ 3006), so as to leave the grand jury without power of amendment, and was brought forward unchanged in § 1346 of the Code of 1892, still leaving the grand jury without power of amending an indictment once filed.

I have been able to find no statute enacted since that time authorizing a grand jury to amend an indictment.

An indictment once filed cannot be withdrawn for amendment. *State* v. *Springer,* 43 Ark., 91; an indictment cannot be amended. *Patrick* v. *People,* 132 Ill., 529; 24 N. E., 619.

Indictments are not within the operation of the statutes of amendment. *Finch* v. *State,* 6 Black, 533.

An indictment can not be amended. *State* v. *McCarty,* 2 Chand., 199, Pin., 513, 54 Am. Dec., 150.

Where an indictment is defective because the prosecutor's name is not indorsed thereon, the defect cannot be amended after trial, since the law of amendments does not apply to criminal cases. *Moore* v. *State,* 21 Miss.

The case of *State* v. *Springer,* 43 Ark., 91, is exactly in

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point. The facts are identically the same in every essential particular. If the court will change the name of the appellant and the offense he is charged with, the language of that decision could be adopted as the opinion of the court in this case.

R. V. Fletcher, assistant attorney-general, for appellee.

This case presented the question whether after an indictment has been filed, a clerical misprision can be corrected. It seems to be sufficiently clear that the indictment was voted for an assault on Dodd. The mistake, as the district attorney explains, arose from the fact that he was laboring under an erroneous impression when he wrote the indictment. The change made by the district attorney was for the purpose of making the indictment conform to the facts; the fact being that no indictment had been found against defendant for assaulting Thompson, but one had in reality been found against defendant for assaulting Dodd.

It is perfectly manifest that upon proper application to the court this indictment could have been amended. It was a defect in form and not in substance. The amendment would not have changed the finding or action of the grand jury. It would merely have conformed the written evidence of the grand jury to the real action of such grand jury. I think that § 1508 of the Code of 1906 gives ample authority for such amendment. For construction of this statute see *Miller* v. *State,* 53 Miss., 403; *Wood* v. *State,* 64 Miss., 761, s.c. 2 South., 247; *Miller* v. *State,* 68 Miss., 221, s.c. 8 South., 273; *Foster* v. *State,* 52 Miss., 695; *Peebles* v. *State,* 55 Miss., 528; *Orr* v. *State,* 81 Miss., 130, s.c., 32 South., 998.

It is true that this amendment was not made upon application to the court and by its order as provided by Code, §§ 1508 and 1509, but these authorities are cited to show that the defect was amendable.

CALHOON, J., delivered the opinion of the court.

The indictment charged the assault as made on J. R. Thomp-

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Statement of the case.

son and was duly presented and filed in the court. It appears as admitted that the prosecuting officer himself changed it by erasing the name of J. R. Thompson and substituting the name of W. E. Dodd for it as the man assaulted. Because of this change the defendant made a motion to quash which was erroneously overruled. If the indictment before us was amendable at all, which we do not decide, it could be done only in strict conformity with Code 1906, § 1509. It must be by an order of the court, that order must be spread on the minutes, and that order must specify precisely the amendment.

Reversed and remanded.

SAMUEL H. FULLERTON ET AL. *v.* WILLIAM D. MCBRIDE ET AL.

[43 South., 684.]

MORTGAGES. *Foreclosure of second. Rights under partly void first.*

Where the description of a part of the property sought to be conveyed by a first deed of trust was void and a second deed of trust on the same property accurately described the whole of it, but recited that a "part of the above property" was subject to the prior deed; and there was a foreclosure of the second deed and a purchase of all the property by the beneficiary therein, the beneficiary in the first deed, by appropriate proceedings can:—

(*a*) Compel the purchaser to account for the value of the property accurately described in the first deed; and

(*b*) Recover a personal decree against his debtor, the grantor in the first deed, for the sum due him after giving credit for the value of the property for which he has held the purchaser under the second deed.

FROM the chancery court of Landerdale county.

FROM the chancery court of Lauderdale county.

HON. JAMES L. MCCASKILL, Chancellor.

Fullerton and others, appellants, were complainants in the

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court below; McBride and others, appellees, were defendants there. From a decree favorable to defendants the complainants appealed to the supreme court.

Appellees McBride executed a deed of trust on sawmill machinery and livestock, and the timber on described land in Lauderdale county, to secure an indebtedness due the Chicago Lumber & Coal Company, of which Fullerton was president. They afterwards executed a second deed of trust on sawmill machinery, livestock, and timber on the same tract of land to secure an indebtedness due the Southern Bank. The first deed of trust did not accurately describe the personal property, but the second deed of trust did describe it accurately, and, after conveying the timber, recited that "part of the above property is subject to a prior deed of trust to Chicago Coal & Lumber Company." Default having been made in the payment of the indebtedness due the Southern Bank, the trustees sold the property conveyed in the second trust deed, and at the sale the Southern Bank became the purchaser. Fullerton and others, owners of the first deed of trust and the debt secured by it, then brought suit in the chancery court against the McBrides and the Southern Bank for the balance due on his indebtedness and secured by the first trust deed.

Brahan & McCants, for appellants.

Witherspoon & Witherspoon, for appellees.

MAYES, J., delivered the opinion of the court.

The deed of trust in question, executed to secure the $3,000 borrowed from the Chicago Coal & Lumber Company, is void for insufficiency in description in so far as the personalty is concerned, but good as to the timber on the land described in the deed. Therefore the court erred in not making the Southern Bank account for the value of this timber, and rendering a decree in favor of complainant for the value of same when as-

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Statement of the case.

certained, as against the bank. It also follows that the judgment against appellees McBrides, should be for only such sum as may be due after crediting the debt due the complainants with the value of this timber.

For these reasons, the cause is reversed and remanded.

JOHN E. HALL COMMISSION COMPANY *v.* GEORGE M. FOOTE ET AL.

[43 South., 676.]

1. ATTACHMENTS IN CHANCERY. *Code* 1906, § 536. *Proceedings. Jurisdiction. Personal decree.*

Under Code 1906, § 536, providing for attachments in chancery against nonresident debtors, a court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of complainant's debt not realized by sale of the attached property.

2. REMEDIAL STATUTES. *Vested right.*

A litigant has no vested right in a rule of procedure or a remedial statute.

FROM the chancery court of Lauderdale county.

HON. JAMES L. MCCASKILL, Chancellor.

Foote and another, appellees, were the complainants and the Commission Company, the appellant, defendant in the court below. From a decree in complainant's favor the defendant appealed to the supreme court.

The complainants sued the defendant, a nonresident corporation, in the chancery court and obtained an atttachment, under Code 1906, § 536, against it. The summons in the case was duly served by the sheriff on the secretary and treasurer of defendant, who was temporarily in the county, and the attachment writ was levied upon goods and chattels of defendant also found in the county.

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Brief for appellant.

The defendant appeared in the suit, answered the bill and made its defense, contending that it was not indebted to the complainants.

The chancery court decreed that it was indebted, adjudged the sum due from it to complainants, $1,615, and rendered a personal decree therefor and, as well, condemned the goods and chattels levied upon to be sold to satisfy the sum found to be due.

Miller & Baskin, and *Alexander & Alexander* and *George B. Power,* for appellant.

We respectfully contend that the decree rendered by the lower court in this case should be reversed on the following grounds:

First. There was no contract on the part of appellant, John E. Hall Commission Company, to deliver the grain in Mississippi; on the contrary, they fully performed their part of the contract when they delivered the grain in good condition to the carrier in St. Louis.

For the purpose of seeing what the contract was, its terms, etc., let us examine the record:—

Foote, one of the complainants testifying, says: "This corn was purchased by wire from John E. Hall Commission Company and confirmed by letter, but I cannot locate the originals; will try to find the duplicates and attach letter." These duplicates were not attached and do not appear in evidence and the only evidence we have from complainants is that the corn was purchased by wire.

Hall, in his deposition, states: "The corn in question was sold as No. 3 corn in St. Louis and no guarantee as to condition on arrival; nor was it sold to be shipped as sound and dry, as the rules for No. 3 corn do not so provide." "This corn was sold as No. 3 corn, was not guaranteed to keep and, in fact, no condition followed this transaction; in fact, a copy of confirmation attached shows corn was sold our terms and not terms

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in Hattiesburg. Buyers in Mississippi during the germinating season would buy only the very driest of corn and, in fact, at no time, buy No. 3 corn."

The invoices for these cars are endorsed, "All sales made positively our terms."

It must be clear in the absence of any evidence to the contrary and in view of the positive evidence in the record that this corn was sold by the Commission Company on its terms in St. Louis, and while the record contains no evidence that the corn was in bad condition when it was inspected (not in every case when it arrived at destination) the record also contains positive and uncontradicted evidence that the corn was in good condition when it was loaded in the cars at St. Louis. This is conclusively shown by the inspection certificates and also by the depositions of witnesses who saw the corn when it was loaded.

The rules of the Board of Railroad & Warehouse Commissioners of St. Louis provide "No. 2 corn shall be mixed corn, dry and reasonably clean, but not sufficiently sound for No. 1." "No. 3 corn shall be mixed corn, reasonably dry and reasonably clean, but not sufficiently sound for No. 2." The court will observe that while No. 2 corn must be dry, No. 3 corn shall be only reasonably dry.

"Where the duty of the seller is to send the goods to the buyer the general rule is that delivery to a common carrier is equivalent to a delivery to the buyer himself." Am. & Eng. Ency. Law, p. 1071.

"It is sufficient that as between the seller and the vendee the goods ordered of the seller by the vendee are to be considered as delivered to the vendee when they are delivered to a common carrier for transportation to him (Story on Sales, sec. 306), and being so delivered to the vendee, he must look to the common carrier for their actual delivery, as the vendor is not further responsible therefor." *Planters Oil Mill* v. *Falls,* 29 So. Rep. (Miss.), 786.

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Brief for appellant.

The telegraphic order being for car-load lots contemplated shipment in car-load lots and the duty of the John E. Hall Commission Company was done when it delivered to the common carrier in St. Louis, for transportation to Foote & Gaston, the four car loads of No. 3 corn, "reasonably dry and reasonably clean." It was sold in St. Louis and it was delivered in St. Louis; if, as is claimed by complainants, it reached destination in bad condition and could not be used by Foote & Gaston, then, obviously, their recourse was on the carrier; recognizing this, the John E. Hall Commission Company, in their letter of May 4th, 1903, wrote, "We are certainly aware that you should have a claim against the railroads for the cars that are delayed and we are only too glad to take the claim up for you as soon as you send us exact memoranda of your losses accompanied by expense bills for same."

Second. The final decree is simply a personal decree against a nonresident for money. The proceeding is purely statutory and there is power only, under Code of 1892, §§ 486 and 487, to subject the indebtedness and there is no warrant for personal decree.

We adopt the above from the opinion of the court in the case of *Academy* v. *Port Gibson Co.*, 80 Miss., 517, s.c., 32 So. Rep., 116, and, in that opinion the court went on to say that "Even in proceedings to foreclose a mortgage there could be no personal decree for the balance unsatisfied from the proceeds of a sale of the mortgaged property, but for the statute authorizing it. There is no statue authorizing such decree in the cases of foreign attachments in chancery as this case is."

The legislature of 1906, following the Code Commissioners, sought to supply the omission from the statutory provisions on this subject as they had previously existed and in sec. 536 on attachment against nonresidents inserted in the provision that "The court shall give a decree *in personam* against such nonresident, absent or absconding debtor if summons had been personally served on him, or if he has entered an appearance."

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This case, however, originated prior to this statute, and is not covered by this section nor by the statutes on sequestration.

The personal decree is for $1,615.25 and the value of the property condemned by the decree is only $1,400.

In the absence of statutory provisions, and even with such statutory provisions, does this court hold that a nonresident, whose property is wrongfully attached in this state and who comes into the court for the purpose of contesting such an attachment, subjects himself to the liability of a personal decree and a judgment over. We think not. Just because the John E. Hall Commission Company is alleged to have property in the state of Mississippi of the value of $1,400 and comes into the court for the purpose of defending an attachment against that property is it to be subjected to a personal decree for the amount claimed by complainants to be due them, or $1,615? We believe the court will not so hold.

Bozeman & Fewell, for appellees.

The defendant, John E. Hall Commission Company of St. Louis, sold and warranted to Foote & Gaston at Hattiesburg the corn in question as No. 3 corn.

It was sold "to be delivered by John E. Hall Commission Company to Foote & Gaston, one car load at Mount Olive, one car load at Collins, Miss., one car load at Hattiesburg, Miss., and one car load at Ellisville, Miss.

The corn was invoiced as No. 3 corn. The freight to destination was prepaid by John E. Hall Commission Company. The price charged was the price at destination and not at St. Louis. The corn was consigned to the order of John E. Hall Commission Company at Ellisville, Miss., and the other points of destination respectively (notify Foote & Gaston merely).

The rendition of a decree *in personam* against defendants below is assigned for error.

The defendant against whom the personal decree was rendered (John E. Hall Commission Company) voluntarily ap-

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Brief for appellees.

peared by counsel and answered the bill and defended the case on its merits to final decree.

This was sufficient under the general rule to give the court jurisdiction of the person. 17 Am. & Eng. Ency. L., 1063.

This court did hold in the case of *Academy* v. *Port Gibson Co.*, 80 Miss., 517, s.c. 32 South., 116, 448 (commonly called the *Rothrock case*), that there was no warrant under §§ 486, 487, Code 1892, for the rendition of a personal decree.

We never fully appreciated the reason for that decision in cases where the defendant appeared and defended on the merits, and we hoped to see it modified or overruled on second consideration by this court.

But in the meantime and while the action at bar was pending and undetermined, the legislature cured the weakness in secs. 486 and 487 by enacting § 536 of the Code of 1906, which expressly authorizes the rendition of a decree *in personam* if the nonresident defendant has entered an appearance.

This statute went into effect on October 1, 1906, and this case was heard and final decree rendered on December 1, 1906.

We submit that § 536, Code 1906, has to do with the remedy only, and applies therefore to actions pending at the date of its enactment (*i. e.*, on the date that it became operative) as well as to actions thereafter brought.

The defendant below had no vested right in the failure of the legislature to confer by §§ 486 and 487 of the Code of 1892 jurisdiction upon the court to render against it a personal decree.

The enactment of § 536, Code 1906, deprived the defendant of no contract right or other right, and of no defense to the action on its merits.

Its effect was merely to confer upon the chancery court jurisdiction (which it did not before have) to render decrees *in personam* against defendants who had been personally summoned in this state, or who had entered an appearance in cases like the case at bar.

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Opinion of the court.

That such statutes apply to pending actions is well established, both by reason and by authority.

Mr. Cooley in his Constituional Limitations (7th ed.), 515, states the rules as follows:

Change of Remedies. Again, the right to a particular remedy is not a vested right. This is the general rule; and the exceptions are of those peculiar cases, in which the remedy is part of the right itself. As a general rule every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right or equity already in existence. And it may abolish old remedies and substitute new; or even without substituting any if a reasonable remedy still remains. If a statute providing a remedy is repealed while proceedings are pending such proceedings will be thereby determined, unless the legislature shall otherwise provide, and if it be amended instead of repealed the judgment announced in such proceedings must be according to the law as it then stands. And any rule or regulation in regard to the remedy which does not, under pretense of modifying or regulating it, take away or impair the right itself, cannot be regarded as beyond the proper province of legislation. See also to the same effect, *Green* v. *Anderson,* 39 Miss., 359; *Manufacturing Co.* v. *Keyser,* 62 Miss., 155; *Coffman* v. *Bank,* 40 Miss., 29; *Rice* v. *Wright,* 46 Miss., 680; *Musgrove* v. *Railroad Co.,* 50 Miss., 677; *Hufford* v. *Railroad Co.,* 64 Mich., 631, 8 Am. St. Rep., 859; *Improvement Co.* v. *Smith,* 85 Va., 306, 17 Am. St. Rep., 259; *Fish* v. *Railway Co.,* 82 Minn., 9, 83 Am. St. Rep., 398, 26 Am. & Eng. Ency. L., 695.

CALHOON, J., delivered the opinion of the court.

On the two points for appellants—first, that the contract for the four car loads of corn contemplated delivery on the cars at St. Louis, and not at the points of destination; and, second, that the ownership of the corn attached was in the Traders'

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Statement of the case.

Elevator Company—it is enough to say that we sustain the chancellor's finding on these questions of fact. On the objection that there was a personal decree against the John E. Hall Commission Company for the balance not realized from the sale of the property attached, it need only be said that, even if we should overrule the ruling, made through the writer of this, on a point not necessary to the conclusion, in *Chamberlain-Hunt Academy* v. *Port Gibson Brick Co.*, 80 Miss., 517, 32 South., 116, 484, the holding here would be good, under Code 1906, § 536. There is no vested right to appellants in the former decision.

Affirmed.

JOSEPH E. MATTHEWS v. DELTA SOUTHERN RAILROAD COMPANY.

[43 South., 475.]

VENDOR AND VENDEE. *Lien. Deed. Recited consideration. Actual consideration.*

A grantor who conveys land on the promise of a representative of the grantee to pay an agreed consideration can enforce his lien thereon for the agreed price though his deed recites a less price.

FROM the chancery court of Leflore county.

HON. PERCY BELL, Chancellor.

The appellant, Matthews, was complainant in the court below, and the railroad company, appellee, was defendant there. From a decree sustaining defendant's demurrer to the complainant's bill and dismissing the suit, complainant appealed to the supreme court.

Complainant sued to enforce a vendor's lien on land conveyed by him to defendant.

The bill alleged that complainant, a negro, was in the employ of one Morgan, an agent of defendant company, to procure a right of way over the lands of complainant and others

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Brief for appellant.

for railroad purposes; that the consideration for the conveyance by complainant to defendant of the right of way was defendant's verbal promise, made by Morgan its agent, to pay complainant $25 per acre for such of complainant's land as should be needed for a right of way, the same to be paid as soon as the defendant should commence to build its railroad through the land; that on such understanding the complainant executed a deed, prepared by Morgan or the defendant company, conveying the land desired by the company; but that this deed, instead of reciting the true consideration, recited that it was made "in consideration of one dollar paid and for the benefits to accrue to the grantor by reason of the building of the railroad." The bill further alleged that this deed, as thus prepared, was a fraud upon complainant, who had relied implicitly upon Morgan; that the true consideration had never been paid nor tendered to complainant; that Morgan had died since the execution of the deed; that the defendant company had taken possession of the right of way consisting of three and nine-tenths acres, and that the defendant company was due complainant $97.50. The bill prayed that this sum, with interest, be decreed to be a lien on the land taken by defendant under the deed for right of way purposes, and for a sale thereof to satisfy this sum.

The defendant demurred to the bill, and the chancery court sustained the demurrer, and dismissed the bill.

Coleman & Wade, for appellant.

Appellant is entitled to show that the nominal consideration of one dollar mentioned in his deed to appellee was not paid, and that it was not the true consideration of the conveyance. *Pollen* v. *James,* 45 Miss., 120; *Meyer* v. *Casey,* 57 Miss., 657; *Cocke* v. *Blackbourn,* 57 Miss., 689; *Ohleyer* v. *Bernheim,* 67 Miss., 75, s.c., 7 South., 319.

Moreover, appellant is entitled to enforce a vendor's lien against appellee for all of the true consideration of the deed

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Brief for appellant.

which remains unpaid. *Dodge* v. *Evans,* 43 Miss., 570; *Pitts* v. *Parker,* 44 Miss., 247; Jones on Liens, sec. 1061. The statute of frauds has no application to a vendor's lien in a case such as this. Jones on Liens, sec. 1062; *Allen* v. *Bennett,* 8 Smed. & M., 672; *Dodge* v. *Evans,* 43 Miss., 570; *Fry* v. *Prewett,* 56 Miss., 783.

Although the bill recites that Morgan was to pay the appellant, this in no wise constitued any waiver of his rights to a lien on appellant's part. *Dunlap* v. *Burnett,* 5 Smed. & M., 702.

The right of the appellant to a lien was not waived by any acknowledgment in the deed of the receipt of consideration. *Gordon* v. *Manning,* 44 Miss., 756.

The appellee has paid nothing for the land, and is a mere volunteer and not a *bona fide* purchaser for value. No person save a *bona fide* purchaser for value can successfully resist the vendor's lien. *Doyle* v. *Orr,* 51 Miss., 229. See also, to same effect, *Upshur* v. *Hargrove,* 6 Smed. & M., 291; *Russell* v. *Watt,* 41 Miss., 698; *Halloway* v. *Ellis,* 25 Miss., 103; *Davis* v. *Pearson,* 44 Miss., 510; *Perkins* v. *Gibson,* 51 Miss., 699; *Champlin* v. *McLeod,* 53 Miss., 484. These cases all hold that a mere volunteer who has paid nothing for land cannot successfully resist a claim under a vendor's lien.

If the negotiation of purchase and agreement to sell be with one person, but the deed be, at his instance, made to another by way of gift or advancement, the person to whom the title is made will be regarded as a volunteer, taking the estate without consideration, and a lien will arise for unpaid purchase money. *Campbell* v. *Henry,* 45 Miss., 327; *Davis* v. *Pearson,* 44 Miss., 508.

A court of equity will regard the substance and not the mere form of agreements and other instruments, and will seek to give the precise effect which the parties thereto intended in furtherance of that intention. *Perkins* v. *Gibson,* 51 Miss., 699. It was clearly never the intention of the appellant, Mat-

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Brief for appellee.

thews, to part with his land without receiving in payment therefor $25 per acre. He has received nothing for his land. The estate of Morgan, deceased, is clearly not liable to him for the purchase money. Appellee paid nothing for the land, and should not be permitted by a court of equity to hold it without paying the appellant the amount actually agreed on, before execution of the deed, as consideration.

Catchings & Catchings, for appellee.

It is manifest that the appellant sold to the appellee railroad company on the credit of W. H. Morgan, and that he did not rely upon any vendor's lien for security. Morgan's verbal promise to pay appellant in itself constituted a waiver of any vendor's lien which might otherwise exist. This court has frequently held that a vendor's lien is waived by the taking of additional security, as, for instance, a promissory note.

The intention of the parties manifestly was that the railroad company should build its road, and that Morgan should pay for the right of way, and there is nothing in the bill to justify the idea that there was any intent to reserve a vendor's lien in the sale of the right of way. The court must look to the intention of the vendee as well as of the vendor, and there is nothing in the bill to show that the vendee railroad company had any knowledge whatever that Morgan had agreed to pay appellant $25 per acre. It would be strange indeed if, under these circumstances, the appellee, acting in good faith, should have constructed its road over the land in controversy, believing that appellant had conveyed the same to it for the recited consideration of $1 and the benefits expected to arise by reason of the construction of the road, and should thereafter learn for the first time that some third person, without its knowledge or consent, had induced appellant to make the deed by promising to pay him a certain sum, and should itself be compelled to make this promise good. This would be imposing upon the appellee a contract into which it had never entered.

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Opinion of the court.

In this case the appellee does not occupy the attitude of a mere volunteer, for it has built its railroad at heavy expense, in compliance with its promise to do so, which was expressed as the real consideration of the deed. It is true that there is a general allegation in the bill that "said deed, so obtained, was a fraud perpetrated by the defendant railroad company and by said Morgan," but this language is merely a legal conclusion. No facts are set forth in the bill which sustain the allegation of fraud.

WHITFIELD, C. J., delivered the opinion of the court.

The complainant was clearly entitled to a lien on the land described in the deed for $25 and interest. The appellee, through its agent, Morgan, got the land, and equity will not permit it to hold it without paying the value agreed on.

The decree is reversed, the demurrer overruled, and the cause remanded, for answer within thirty days from the filing of the mandate in the court below.

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Statement of the case.

A. H. SMITH *v.* W. DENNY & COMPANY.

[43 South., 479.]

1. TAX-TITLES. *Bill to confirm. Parties. Code* 1892, § 498 (*Code* 1906, § 548).

A bill to confirm a tax-title under Code 1892, § 498, providing that all persons interested be made defendants is demurrable for want of proper parties where one named in the tax-deed exhibited with the bill as the person assessed with the taxes for which the land was sold, is not made a defendant, nor any reason given for such omission, although the bill is verified by oath and alleges "that the defendants named are the only ones, so far as complainant can ascertain after diligent inquiry."

2. SAME. *Leave to amend. Dismissal.*

When a demurrer to a bill has been sustained for want of proper parties, it is not error to dismiss the bill on complainant's declining to avail of leave to amend by joining as a defendant the party improperly omitted.

3. SAME. *Pleadings. Averments as to title. Collector's deed. Effect of same. Code* 1892, § 1806 (*Code* 1906, § 1983).

A bill to confirm a tax-title which avers that complainant acquired title through his purchase at a tax-collector's sale, evidenced by the collector's deed exhibited with the bill, sufficiently sets out complainant's title, since under Code 1892, § 1806 (Code 1906, § 1983) the collector's deed to an individual is *prima facie* evidence that the assessment and sale of the land were legal and valid.

FROM the chancery court of Jackson county.

HON. THADDEUS A. WOOD, Chancellor.

Smith, the appellant, was complainant in the court below; and W. Denny & Company, a corporation, and others, the appellees, were defendants there. From a decree dismissing the bill complainant appealed to the supreme court.

Appellant filed his bill in chancery in June, 1905, claiming title to land sold to him March 3, 1902, for the taxes of 1901. The bill alleged that the appellee, W. Denny & Company, was,

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Brief for appellant.

in so far as appellant could with due diligence ascertain, the only other person having or asserting any interest, legal or equitable, in the land, and made the appellee, and all unknown persons who might claim a legal or equitable interest therein parties defendant. It prayed for confirmation of the tax title, and for cancellation of any claim to the land appellee might assert and of all other outstanding titles to the land in conflict with appellant's. His tax deed, an exhibit to the bill, described the land as "situated in said county and state, and assessed to Wm. F. Allman, to-wit: S. ½ of N. W. ¼ of section 12, township 3, range 6, west."

A demurrer to the bill was sustained, and, as appellant declined to amend, the court below dismissed the bill.

Code 1892, § 498 (Code 1906, § 548), provides that in all suits to confirm tax titles the names and places of residence of all persons interested in the land, so far as known to complainant or so far as he can ascertain by diligent inquiry, must be stated in the bill, and such persons be made parties defendant thereto.

Sanders & Dudley, for appellant.

The bill seeks a confirmation against the only person claiming the land adversely to appellant, so far as appellant knows or can with due diligence ascertain. Nowhere does the statute, Code 1892, § 498, require the joinder of persons unknown to the complainant. It merely permits it. The construction placed upon the statute by the lower court is strained and not warranted by the language of the statute.

We call the court's attention to Code 1906, § 548, which is identical with Code 1892, § 498, providing the method to be pursued in suits for confirmation of tax titles. What sort of deraignment is there required? The statute merely declares that the complainant "shall set forth his claim under the tax sale," which is the deraignment required by the statute.

Code 1892, § 1806 (Code 1906, § 1983), declares that the

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Brief for appellee.

tax collector's deed shall raise the presumption "that the assessment and sale of the land were legal and valid." This court has repeatedly construed the statute to mean that an allegation of the tax sale, in a bill to confirm a tax title, is sufficient deraignment, making a *prima facie* case on the issue involved. *Belcher* v. *Mhoon,* 47 Miss., 613; *Griffin* v. *Dogan,* 48 Miss., 17; *Meeks* v. *Whateley,* 48 Miss., 337; *Coffee* v. *Coleman,* 85 Miss., 14, s.c., 37 South., 499.

Denny & Denny, for appellee.

Code 1892, § 498 (brought forward as Code 1906, § 548), under which this suit was instituted, provides, among other things, that a complainant in suits of the character of the case at bar, shall set forth in his bill his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to complainant, or as he can ascertain with diligent inquiry; and the code section concludes with the provision that the decree of confirmation authorized thereby shall, when rendered, be held as conclusive evidence that the title to the land involved has become vested in the complainant as against all persons claiming the same under title existing prior to the sale thereof for taxes.

The tax deed under which appellant claims title, and which is made a part of the bill of complaint as an exhibit thereto, discloses the fact that when appellant bought the land at the tax sale, it was assessed to one Wm. F. Allman. Yet, notwithstanding this recital in the deed, and notwithstanding the requirement of Code 1892, § 498, that all known claimants to the land shall be made parties defendant in the bill for confirmation, appellant refused or neglected to make Wm. F. Allman a defendant, and failed to show why this person was omitted from the bill. The bill moreover failed to show whether appellee did or did not claim title under Allman, and also failed to show that appellee does not claim title under ap-

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pellant. It must be inferred that Allman was a claimant of the title of the land when sold.

The long-established rule of practice and pleading is that the complainant must set forth in his bill for confirmation of the tax sale all the essential facts to be considered in the case and on which issue may be taken. In bills to confirm title to real estate, Code 1892, § 501 (Code 1906, § 551), requires the complainant to set forth the deraignment of his title, and must show as perfect a title, legal or equitable, as would enable him, if the title were a legal one, to recover against the defendant in an action of ejectment. *Chiles* v. *Gallagher,* 67 Miss., 413; *Jackson* v. *Bank,* 85 Miss., 645, s.c., 38 South., 35; *Long* v. *Stanley,* 79 Miss., 298, s.c., 30 South., 23; *Wilkinson* v. *Hiller.* 71 Miss., 678, s.c., 14 South., 442. The appellant's bill fails to set forth all the facts constituting the right of the tax collector to make the sale, hence the decision of the lower court was correct. *Peterson* v. *Kittridge,* 65 Miss., 33, s.c., 3 South., 65, 5 South., 824; *Pearce* v. *Perkins,* 70 Miss., 276, s.c., 12 South., 205; *Gregory* v. *Brogan,* 74 Miss., 694, s.c., 21 South., 521; *Bynum* v. *Stinson,* 81 Miss., 25, s.c., 32 South., 910.

MAYES, J., delivered the opinion of the court.

The bill of complaint filed in this cause is demurred to because, as stated in the demurrer, "complainant merely states a conclusion of law when he avers that the tax sale, under which he claims title to the land in controversy, was legal and valid, instead of alleging the instances of and specifically setting forth all the facts necessary to constitute a valid sale of the land by the tax collector"; and, secondly, because "complainant has not in his bill stated such a cause as entitles him to the relief sought." If the bill of complaint be treated as a proceeding under § 498 of the Code of 1892, instituted for the purpose of confirming a tax title, it is imperfect, in that the owner of the land at the date of the sale is not made a party. If the owner at the time the sale was made is dead, that fact should

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be stated in the bill, and his heirs, if known, made parties, and, if unknown, the fact should be alleged. It is of the very essence of a proceeding to confirm a tax title that the owner of the land at the date of sale, or his heirs, as the case may be, should be made parties, as well as other persons interested in the land, so far as known to the complainant, or as he can ascertain by diligent inquiry. It is true that complainant alleges in his bill "that the defendants named are the only ones, so far as complainant can ascertain after diligent inquiry"; but the allegation of the bill is contradicted by the tax deed filed as an exhibit, which on the face of it recites that the land was assessed as the property of W. F. Allen, who is not made a party to the bill. The very purpose of sec. 498 being to confirm a tax title, who could be imagined to be a more necessary party, or have greater interest in the proceeding, than the party who is about to lose his land by virtue of the very act that complainant seeks to vest the title in himself? All interested parties, so far as known or can be ascertained by diligent inquiry, must be made parties by the complainant, and over and above every one else it is necessary to make the former owner a party.

If the complainant had made the necessary parties defendant to his bill, it was not necessary for him to set forth all the facts constituting the right of the tax collector to make the sale, as contended by appellees. Section 1806 of the Code of 1892 makes the tax collector's deed, together with the list of lands sold to the state at such sale, *prima facie* evidence that the assessment and sale of the land was legal and valid. Therefore, when complainant charged in this bill that the land was sold and that the list of lands sold to the state at the time this sale was made, shows that these lands were sold, and makes the tax collector's deed an exhibit to the bill, he has stated a perfect cause of action. If there is anything affecting the validity of this tax sale, it is defensive, and should be set up by the defense; but it is not required that the complainant should do more than state

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his cause of action in the manner in which he has stated it. The authorities cited by counsel for appellee are not applicable to a proceeding under § 498, Code 1892. *Griffin* v. *Dogan,* 48 Miss., 11; *Belcher* v. *Mhoon,* 47 Miss., 613; *Coffee* v. *Coleman,* 85 Miss., 14, 37 South., 499.

The decree of the chancellor, dismissing the bill, under the circumstances as shown by the decree, was proper. The bill of complaint showing on its face that no valid decree could be made, because of the failure of complainant to make defendant to his bill parties that were necessary, it was the duty of the chancellor to order complainant to amend his bill by joining these parties as defendant, and, on failure to do so, dismiss the bill of complaint; and this he did. *Lemmon* v. *Dunn,* 61 Miss., 210; *Burroughs* v. *Jones,* 78 Miss., 235–243, 28 South., 944. The decree of the chancellor specifically points out to complainant the defects in his bill, and recites that leave was granted to complainant to amend his bill, which he declined to do, whereupon he dismisses the bill, and complainant appeals.

If leave to amend had not been allowed the complainant, we would remand the case; but, since leave to amend was granted and refused, the decree must be affirmed. Burroughs v. *Jones,* 78 Miss., 243, 28 South, 944.

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Statement of the case.

JOHN J. PLEASANTS v. FRANK L. SMITH ET AL.

[43 South., 475.]

EQUITY JURISPRUDENCE. *Injunction. Criminal prosecutions. Disturbing peace. Megaphone.*

Equity will not enjoin the making of affidavits against a merchant and the arresting and fining him for alleged disturbances of the peace in using a megaphone to call attention to a clearance sale; there being in a just sense no property right involved and his rights, whatever they be, are determinable in the law courts.

FROM the chancery court of, second district, Coahoma county.

HON. PERCY BELL, Chancellor.

Pleasants, appellant, was complainant in the court below; Smith and another, appellees, were defendants there. From a decree dissolving a preliminary injunction the complainant appealed to the supreme court.

Pleasants was engaged in mercantile business in the town of Clarksdale. Being heavily over-stocked with goods, and having pressing obligations, he instituted a clearance sale of his stock. As a means of advertising the sale he went in person upon the streets of the town in the vicinity of his store, and, by the use of a megaphone, from time to time, called the attention of the general public to the sale. He continued this for several weeks, both in person and through agents. While so engaged he was arrested by the appellee, Smith, the town marshal, upon affidavit made by Smith before one Johnson, mayor *pro tempore* of Clarksdale, and an appellee here, charging that appellant in so advertising his sale violated an ordinance of the town which (omitting formal parts) is as follows: "If any person shall, within the corporate limits of said town, wilfully disturb the peace and quiet of said town by loud and unusual noise, by yelling, swearing, using obscene lan-

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Brief for appellant.

guage or conversation, by quarreling, challenging or fighting, such offender shall be deemed guilty of a misdemeanor and breach of this ordinance, and, upon conviction thereof before the mayor, shall be fined not less than $2.50 nor more than $10, and shall remain in the custody of the marshal until such fine and costs are paid."

Appellant was tried, convicted and fined under this ordinance; appealed to the circuit court, and, being released under bond, again proceeded to use his megaphone upon the streets of the town as before. He was twice again arrested, tried, convicted, and appealed; and was, moreover, notified both by the mayor *pro tempore* and by the marshal that as long as he continued to use his megaphone to advertise his sale, he would be arrested and tried for violation of the ordinance. He thereupon sued out an injunction against the mayor *pro tempore* and the marshal, his bill of complaint alleging that his method of using the megaphone was in no wise disorderly or against the terms of the ordinance, and further that the defendants, in making affidavits against and arresting and fining him, sought to harass him without just cause; and that, if not permitted to advertise his sale in the method adopted, he would sustain great injury. A motion was made by defendants to dissolve the injunction, many affidavits were filed by the respective parties, those for the complainant being to the effect that there was no disturbance of the public by the use of the megaphone, while those for defendant alleged that complainant's methods constituted a public nuisance because of loud and incessant din and noise. The chancellor sustained the motion, dissolved the injunction, and awarded $250 damages as a solicitors fee for defendants.

D. A. Scott, for appellant.

The ordinance under which the appellant was tried and convicted, and under which he is threatened to be again and again tried and convicted if continuing in his course of adver-

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tising, is clearly in violation of both the state and federal constitutions. It deprives the appellant of his property and civil rights without due process of law, and also denies him the equal protection of the laws in that it has the effect of preventing the appellant or any one else from exercising the right of free speech. The ordinance makes it a misdemeanor even to talk in a very loud tone of voice upon the streets of the municipality.

This court through COOPER, C. J., in dealing with the constitutionality of an act of the legislature declaring that the erection of certain buildings on the Gulf front in Bay St. Louis should be a nuisance, used language, which if slightly changed would suit this case to a nicety. See *Quintini* v. *City Bay St. Louis,* 64 Miss., 483, s.c., 1 South., 625. Judge COOPER stated in the case cited that "the legislature cannot constitutionally declare that a given use of a particular tract or parcel of land is harmful and a nuisance; for this would be exercising a judicial function." By the same reasoning it is here submitted that the municipality of Clarksdale cannot constitutionally declare that any person is guilty of wilfully disturbing the peace and quiet of the city of Clarksdale merely by talking, as did appellant, in an ordinary tone of voice, even though the person uses a megaphone through which he talks. Such effort on the part of the municipality would be *ultra vires.*

In the *Quintini case, supra,* Justice COOPER further states that "it is with common humanity that the legislature and courts must deal, and the use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class." We say here that we are dealing with a common humanity, and we contend that the appellant by using a megaphone through which he talked did not commit an act which in common sense and reason would be regarded as a disturbance of the peace and quiet of the community, by the average man, even though that act should be repugnant to some sentiment of a particular class.

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The opinion in the *Quintini case* further states that "the legislature in the exercise of police power may prohibit in particular localities such use of property as injures the public health, and what it may do may also be authorized to be done by the local authorities, but it does not follow that it may by mere declarations convert the harmless, proper and ordinary use of property into a nuisance." We respectfully submit that this language is peculiarly applicable to the case at bar. For even if it be admitted that the city of Clarksdale had the legal right to pass the ordinance under which appellant was convicted, it does not follow that by a mere declaration the municipality could prohibit or did intend to prohibit the harmless, proper and ordinary use of the human voice by its citizens.

It is further stated in the *Quintini case* that "the fact that, in declaring buildings of the character in question nuisances, the municipal authorities have provided that persons who erect them may also be prosecuted in the courts of the town, does not preclude relief by injunction. The ordinance, as we have said, is an attempted dedication of private property to public uses without due compensation first made, and this a court of chancery has jurisdiction to prevent. It is immaterial that the exercise of this power will, as a consequence, protect the owner from criminal prosecution." We again respectfully say that the reasoning here indulged in by Justice COOPER applies with peculiar force to the questions with which this court is here called upon to deal in this litigation. See *Dobbin* v. *Los Angeles,* 195 U. S., 223, 49 L. Ed., 169.

As regards the contention of the appellees that the appellant had a plain, adequate and complete remedy in a court of law, we submit that such was not the case, inasmuch as every act of the appellees, complained of by appellant, was done *colore officii,* and it was not contended by appellant that the appellees acted dishonestly or fraudulently. In fact, it was presumed by appellant that the mistakes of appellees, recited in the bill

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of appellant, were honest and judicial errors for which they would not be liable in a civil or criminal action.

It is equally clear that the city of Clarksdale, as a municipality, would not be responsible in damages for any such mistake of these duly commissioned officers. Appellant's sole recourse, accordingly, was to a court of equity. 22 Cyc., 763, 764.

"When irreparable injury is spoken of it does not mean that the injury is beyond possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." *R. R. Co.* v. *R. R. Co.*, 181 Ill., 605; *Montgomery Bank* v. *Tyson*, 133 Ala., 459; *Olifant* v. *Richmond*, 67 N. J. Eq., 280. "Damages at law are inadequate when they cannot put the injured party in *statu quo*." *Wood* v. *Sutley*, 16 Jur., 75. See also *Patterson* v. *Gate City Gas Light Co.*, 71 Ga., 106.

There cannot be any dispute as to the proposition that as a general rule courts of equity will not interfere by injunction to restrain or enjoin the commission of a criminal offense or to enjoin any criminal proceedings had or begun under any state statute or municipal ordinance. But it is here questioned by appellant whether any exceptions have been grafted upon and thereby become an integral part of this fundamental and universal rule. And appellant contends that there is one exception to this general rule, which we here state: wherever it is made to appear to a court of equity that any citizen is, by the oppressive, arbitrary and harassing action of another in causing his arrest, about to be despoiled of his property or civil rights, the court of equity will reach out its strong arm to grant relief, even though in so doing the extraordinary writ of injunction is necessary, and the party against whom the complaint is made is thereby precluded from proceeding in a criminal action against the complainant. See *Sheridan* v. *Colvin*, 78 Ill., 237; *In re Sawyer*, 124 U. S., 200; *Emperor of Austria* v. *Day*, 3 De Gex. F. & J., 217; *Spinning Co.* v. *Riley*,

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L. R., 6 Eq., 558; *Live Stock Ass'n* v. *Crescent City, etc., Co.*, 1 Abb. (U. S.), 389.

If we accept the doctrine announced by the cases above cited, it is manifest that under the exception to the general rule, courts of equity will without hesitation grant injunctions to prevent criminal prosecutions under statutes or municipal ordinances, and will sustain such injunctions where property rights or civil or political rights are in any wise involved. See *City of Rushville* v. *Gas Light Co.*, 15 L. R. A., 321; *Davis* v. *Fasig*, 128 Ind., 271; *Express Co.* v. *Ensley*, 116 Fed. Rep., 756.

In 22 Cyc., 902, it is stated that the rule is well settled that where the intervention of equity by injunction is warranted by the necessity for protection of civil rights or property interests, the fact that a crime or statutory offense may be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction. See also *Mobile* v. *L. & N. R. R. Co.*, 84 Ala., 116; *Osborn* v. *Bank*, 9 Wheat. (U. S.), 739; *Davis* v. *Gray*, 10 Wall., 203.

Equity will enjoin criminal proceedings under a void municipal ordinance where property rights will be destroyed by its enforcement. *Dobbins* v. *City of Los Angeles*, 195 U. S., 223, 49 L. Ed., 169; *Forscheimer* v. *Mobile*, 127 S. C., 112; *Cicero Lumber Co.* v. *Cicero*, 68 Am. St. Rep., 155, 176 Ill., 9; *Austin* v. *Cemetery Ass'n*, 87 Tex., 339.

Courts of equity will by injunction prevent the commission of crime wherever any property rights or civil rights are involved. Justice BREWER, speaking for the United States supreme court, enunciates this in the suit of *Eugene Debs*, 158 U. S., 564, 39 L. Ed., 1093. See numerous cases cited in that case.

This is indeed the winter of appellant's discontent, and unless he is helped by equity there will be nothing to make his winter a glorious summer, inasmuch as he will, without aid of equity, be left without any possible hope or possibility of relief.

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Brief for appellees.

Chas. W. Clark, for appellees.

The contention of the appellant that he did but speak "in an ordinary tone of voice" through his megaphone, is open to some objections. A "megaphone" is defined by Webster's Dictionary, 1906 edition, as "a form of speaking trumpet." A "speaking trumpet" is defined by this same authority to be "a conical, flaring-mouthed tube employed to intensify the sound of the human voice." Hence appellant might have spoken in what he chooses to call "an ordinary tone of voice," and yet have had his tones so "intensified" as to constitute a "loud and unusual noise." If an ordinary tone of voice was sufficient to advertise to the public the sale, why did appellant need to use a megaphone?

The chancery court had no jurisdiction in this case, because there was, in strict construction of law, no property right of the appellant involved. The *Quintini case,* 64 Miss., 483, s.c., 1 South., 625, cited by appellant, does not support his contentions. There the town passed an ordinance that no owner of real property between the shell road and the shore could build a house thereon; the object being to preserve unimpaired the view of Mississippi Sound. Mrs. Quintini attempted to build a house on her land between the shell road and the shore, and was arrested for violating the ordinance, and threatened with other arrests. This court held that the ordinance was void on its face in that it was an attempt to take property without due process of law. The *Quintini case* thus involved real property under a void ordinance. But the appellant, Pleasants, has here shown no property rights which have in any way been infringed upon. The ability to blow a megaphone may be an accomplishment; but it is hardly a vested right.

That no property rights are here concerned is apparent. The city officials made no objection to Pleasants' clearance sale. He might have advertised in the press or on fences. He might have plastered every wall for miles around with notices. He might have lined the streets with "sandwich men." And in

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any such case the town officials would not have made objection. But there is a wide gulf between legitimate advertising and committing public nuisance by unusual methods in trade. Every city in the land rightfully exercises a restraining power over "street fakirs." All sorts of restrictions are cast about the use of the festive street piano in the hands of the enterprising foreigner. Every town has the right to put restrictions on the use of the shrill steam whistles within the corporate limits. Yet, in the face of this, and in the face of the principle involved, Pleasants, under the idea that he is entitled to free speech, thinks he may be immune when he seeks to bombard his unwilling neighbors, through a megaphone, with a glowing description of his goods, wares and merchandise. Would Pleasants have the right to make everybody else unpleasant by beating a drum to attract trade, or to blow a steam siren whistle continuously, or to explode cannon fire-crackers in the streets for advertising purposes? When we consider property rights we must keep in mind the property rights of the other good citizens of Clarksdale as well as the rights of the appellant.

If it be one of the rights of free speech, guaranteed to every individual under the constitution, to blow a megaphone about the streets of a populous town, how about this proposition: Suppose the action of the appellant in using his horn had caused a passing team of horses to run away in fright, and injure some woman; or suppose that appellant had marched in front of some dwelling house where a person lay at death's door, and there had bawled through his flaring-mouthed megaphone the news that he, appellant, was holding a clearance sale where goods were to be sold at very low prices, and suppose that this news had sent the sick man into convulsions. Could it in such instances be justly contended that the appellant was only exercising his constitutional rights, and that the injury sustained either by the woman or by the sick person was *damnum absque injuria*?

It is true that the appellant's bill of complaint alleged that unless the appellees were restrained from arresting and trying

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him under the ordinance in question, he would sustain irreparable injury. The phrase "irreparable injury" is a very vague term. We submit, however, that when used with reference to the jurisdiction of courts of equity, the phrase must be considered as giving jurisdiction only when injury to property rights are concerned. And before a person is entitled to an injunction, if he relies upon equity to help him because of his being threatened with "irreparable injury," he must show that the injury is to his rights of property. In the instant case, no one denies that the appellant has the right to his stock of goods; even his ownership of the megaphone is not disputed. But his contention is, that if he is not permitted to use his megaphone in a certain way, irreparable injury will result to his large stock of goods. This is a futile contention. Suppose Richard Roe has a large garden just within the corporate limits of a town, which is attacked by a great flock of crows. Suppose, further, that, to protect his garden, Richard Roe fires off his gun at them. Now a town ordinance forbids the firing of one's gun within the town's corporate limits. Can Richard Roe say in defense, when arrested for violating the town ordinance, that the land and crop and the gun are his, and that unless permitted to shoot his gun irreparable injury will be inflicted on his crop by the crows? The only difference between Richard Roe's case and the appellant's is, that Richard Roe is trying to drive away a crowd of crows, while appellant is seeking to attract a crowd of men. The law says that there are better ways to drive away crows and better ways to attract crowds than by using guns and megaphones to the detriment of all good citizens in the neighborhood.

This case is settled by the case of *Crighton* v. *Dahmer,* 70 Miss., 602, s.c., 13 South., 237, which holds that "equity has no jurisdiction to enjoin one from making affidavits charging a criminal offense. It is immaterial that the prosecution is alleged to be groundless, and that the defendant has threatened to continue to have the complainant arrested from day to day as a

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trespasser because of his occupancy of certain premises, the possession of which the defendant claims." See also the clear cut decision of the court of New York in the case of *Davis* v. *Society for Prevention of Cruelty to Animals,* 75 N. Y., 362. Also *Poyer* v. *Village of Des Plains,* 123 Ill., 111, 13 N. E., 819, 5 Am. St. Rep., 494; and *Paulk* v. *Mayor of Sycamore,* 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772.

The case of *Dobbins* v. *City of Los Angeles,* 195 U. S., 223, 49 L. Ed., 169, cited by appellant, is, like the *Quintini case,* 64 Miss., 483, a case wherein property rights in real property were concerned; hence, for the reasons above shown, cannot be here applicable.

There was ample proof before the lower court to sustain the claim of appellees that the use of the megaphone by appellant caused such a constant din and uproar as would constitute a public nuisance.

WHITFIELD, C. J., delivered the opinion of the court.

The chancery court had no jurisdiction whatever in this cause. There are no property rights involved, in any proper sense of the word "property." The constitutionality of the ordinance, if it is assailed, can be determined in the law court. Whether, if constitutional, the appellant is guilty or not, is a question exclusively of criminal jurisdiction, with which equity has nothing to do. The case is wholly unlike *Quintini* v. *Board of Mayor and Marshal of Bay St. Louis,* 64 Miss., 483, 1 South., 625, 60 Am. Rep., 62, for there property rights in real estate were directly involved. The case falls squarely within the case of *Crighton* v. *Dahmer,* 70 Miss., 602, 13 South., 237, reported in 35 Am. St. Rep., 666, with notes. And see, same case and notes, 21 L. R. A., 84. The general principle insisted upon by the learned counsel for the appellant may be conceded—the principle announced in the case of *Quintini* v. *Bay St. Louis, supra;* but in no possible legal view can the appellant be said to have involved here any proper rights, or to

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be subjected to any irreparable damage. We quote, to approve, the following language from *Davis* v. *Society for Prevention of Cruelty to Animals,* 75 N. Y., 362. In that case the complainant had been arrested and convicted for killing animals in a brutal manner, and was threatened with more arrests if he did not desist. In denying his appeal from a decree dissolving a restraining injunction, the court said: "If this action could be maintained in this case, then it could in every case of a person accused of a crime, when the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria,* unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such a damage by being a member of organized society, and his compensation for such risks may be found in the general welfare which the society is organized to promote. The case of *Dobbins* v. *City of Los Angeles,* 195 U. S., 223, 25 Sup. Ct., 18, 49 L. Ed., 169, is, like the *Quintini case,* one in which property rights in real property were involved.

We refer specially to two cases cited by learned counsel for appellee: *Poyer* v. *Village of Des Plains,* 123 Ill., 111, 13 N. E., 819, 5 Am. St. Rep., 494; *Paulk* v. *Mayor of Sycamore,* 104 Ga., 24, 30 S. E., 417, 41 L. R. A., 772, 69 Am. St. Rep., 128. In the first of these cases a town ordinance prohibited all public picnics and open air dances within the town limits. The complainant filed his bill, in which he alleged that he had

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grounds within the town limits which he had fitted up for picnics, etc., and that all the assemblages on his grounds had been orderly, etc.; that he had been arrested for violating the ordinance, and that he was threatened with other arrests, unless he refrained from having these public picnics and dances; that the suits were brought maliciously to ruin his business and reputation, and that he would suffer irreparable injury unless they were enjoined; that he had been fined $50 in one case, from which conviction he had appealed to the criminal court of Cook county; that the defendants had threatened to institute other prosecutions, etc. The court said: "Nothing could be more detrimental to society and provocative of violation of law than for courts of equity to interfere in such cases by injunction and thereby protect repeated acts in violation of ordinances which might each furnish new ground for complaint. While the injunction continued, the functions of municipal government would be suspended, and irreparable injury might thereby ensue. If the municipal law be of doubtful validity, the complainant cannot, by his wilful and repeated violations of its provisions, each furnishing separate grounds for prosecution, and depending upon separate facts, create this ground for equitable interposition, without first settling the validity of the ordinance in the courts of law. If he fears the prosecution of other suits, he can refrain from repetition of his acts in violation of its provisions until the proper forum has determined its validity. If the authorities of this village can be enjoined from prosecuting under an ordinance preservative of the peace, so they might be restrained from the enforcement of any other ordinance of the village. Their effort to discharge their duty to the public would be unavailing, and the community left at the mercy of the lawless and vicious elements of society until such time as the question could be settled in the courts of equity. If it should, at last, be determined that the ordinance was valid, that court would be powerless to enforce its provisions, or impose the pen-

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alties denounced against its violation, but must remit the cases to the courts of law, which, before the assumption of jurisdiction by the courts of equity, had the right to determine every question submitted to, and determined in, the equity jurisdiction." In the latter case the court said: "Having voluntarily gotten himself into his predicament, he now invokes the aid of equity to extricate him therefrom, upon the plea that his business will be ruined without authority of law unless he is afforded this relief. He deliberately undertook to test the validity of both the local law and the ordinance of Sycamore by voluntarily and knowingly engaging in the business which they prohibited. He has ample opportunity to make this test in the courts having jurisdiction over criminal matters, and a court of equity will not invade their domain in his behalf."

It may be remarked, in conclusion, that the jurisdiction of equity in matters of this character, even where property rights have been involved, has been pressed to the utmost limit that principle and reason can possibly uphold. Indeed, the jurisdiction should be restricted, rather than expanded. Certainly this case falls clearly outside the jurisdiction of the equity court in any possible view of the matter.

The decree of the chancellor is affirmed.

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Statement of the case.

FAIRBANKS COMPANY v. WILLIAM S. GRAVES.

[43 South., 675.]

SALES. *Conditional sales. Resale by buyer. Remedy.*

Where a seller reserved title to personal property sold by him to secure the purchase price, he may assert such title to enforce payment against the buyer and those claiming under him, in the absence of evidence that he knew the buyer was a dealer in such articles and bought to resell.

FROM the chancery court of Copiah county.

HON. DAVID M. MILLER, Judge.

Fairbanks Company, appellant, was the plaintiff in the court below; Graves, appellee, was defendant there. From a judgment in favor of the defendant, predicated of a peremptory instruction, the plaintiff appealed to the supreme court.

The Fairbanks Company, a corporation, sued Graves, the appellee, in replevin to recover a gasoline engine sold by plaintiff to the Freeman Service Company, from whom Graves purchased the engine. The suit was instituted before a justice of the peace who rendered judgment in favor of plaintiff and Graves appealed to the circuit court. On the trial in the circuit court plaintiff introduced in evidence a written contract entered into between it and the Freeman Service Company, dated August 14, 1905, for the purchase by the Freeman Service Company of the engine for $150, of which amount $75 was recited as having been paid in cash, the balance $75 was agreed to be paid within thirty days from date; it further provided that the title to the engine was reserved in the seller until the balance, $75, evidenced by a note of the Freeman Service Company, should be paid, and the balance was due and unpaid when the action was begun. It was undisputed that the contract was not recorded in Copiah county, the domicile of the Freeman Service Company. Graves, the appellee, testified that he

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Brief for appellant.

bought the engine from the Freeman Service Company without notice of any claim of the plaintiff existing at the time, and that shortly thereafter the Freeman Service Company went into bankruptcy. Subsequently, while Graves was still indebted for part of the purchase price of the engine under his contract of purchase from the Freeman Service Company, he was notified, according to his testimony, by the attorney of the plaintiff, that the Fairbanks Company claimed title to the engine because the balance of $75 remained unpaid. Graves subsequently paid to the trustee in bankruptcy of the Freeman Service Company the balance due by him to the bankrupt upon the trustee indemnifing him against loss.

There was no evidence that the Freeman Service Company was a dealer in engines, although it was shown that it was engaged in plumbing, and had contracts for putting in electric lights and waterworks plants, nor was there evidence that the Fairbanks Company had any knowledge that the Freeman Service Company bought the engine with an intention of reselling it, or that the Fairbanks Company had any reason to believe that it would be resold.

Willing & Wilson, for appellant.

The contention of the defendant, the appellee in this court, in the court below was, first, that the Freeman Service Company had been adjudged a bankrupt, and that the case should have properly been brought in the bankrupt court; second, that the defendant was an innocent purchaser for value, and had obtained a perfect title to the property in controversy from the Freeman Service Company.

As to the first of these contentions of appellee, we say that there is no proof in the record that the Freeman Service Company had gone into bankruptcy, and no proof that Geo. W. Covington was the trustee of the Freeman Service Company except the statement of Covington himself. Be that as it may, however, the court of bankruptcy had nothing whatever to do

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with this controversy. This property had been sold by the Freeman Service Company to Graves long before the company went into bankruptcy, and whatever title the Freeman Service Company had in the engine had passed to Graves. The controversy concerning the title to the property was therefore between the Fairbanks Company and Graves, and the trustee in bankruptcy of the Freeman Service Company had no concern whatever with that controversy.

As to the second proposition relied upon by counsel for appellee, we say that the proof shows beyond a shadow of a doubt that Graves was not an innocent purchaser for value, and that he did not obtain a perfect title to the property in controversy from the Freeman Service Company. Counsel for appellee relied in the lower court on the case of *Columbus Buggy Company* v. *Turley,* 73 Miss., 529, 19 South. Rep., 232. That case is totally dissimilar from the case at bar. In that case the contract showed that the buggies were sold to J. M. Smitha, with the understanding that Smitha should have full control over the buggies and should have the right to sell and dispose of all the buggies received by him under the contract. The buggies were placed by Smitha in his place of business, and the only sign upon his place of business were the words: "J. M. Smitha, Proprietor," and the property in litigation was used and acquired in that business. This court very properly held in that case that a vendee of goods under a contract that reserved title in the vendor until payment was made, but also by its terms conferred a right upon the vendee to resell the same, has the power of disposition in respect thereto, and a creditor of the vendee who purchased the goods in satisfaction of his indebtedness, without notice of the vendor's claim, acquired title to the same. The facts in the case at bar are totally dissimilar from the facts in the case relied upon by counsel for appellee.

It is true that in this case there is some proof that the Freeman Service Company made contracts in several towns for the erection of electric light and waterworks plants, but there was

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absolutely no proof that it ever maintained a place of business for the purpose of selling gasoline engines, and no proof that it ever sold a gasoline engine to any one else. It is true that the company offered to sell a Fairbanks engine to one Hawkins, but there was no proof whatever that it was the agent of the Fairbanks Company, and there was no proof that the Fairbanks Company shipped the company engines for the purpose of resale. The record simply shows one isolated sale from the Fairbanks Company to the Freeman Service Company, with a reservation of title, and sale by Paul Freeman, who was the same as the Freeman Service Company, to Graves, the appellee. Graves was not an innocent purchaser for value. *Watts* v. *Ainsworth,* 89 Miss .,40, 42 South. Rep., 672. We hardly deem it necessary to cite other authorities in support of the proposition that one who purchases personal property, the title to which has been reserved by the seller, is not an innocent purchaser as against the seller, even though without notice of the seller's rights, and although the contract is not recorded. See, however, on that proposition, the following cases: *Ketchum* v. *Brennan,* 53 Miss., 596; *Duke* v. *Shackleford,* 56 Miss., 552; *Dederick* v. *Wolfe,* 68 Miss., 500, s.c., 9 South., 350; *Tufts* v. *Stone,* 70 Miss., 54, s.c., 11 South., 792; *Journey* v. *Priestly,* 70 Miss., 584, s.c., 12 South., 799; *Gayden* v. *Tufts,* 68 Miss., 691, s.c., 10 South., 53.

Graves' own testimony shows also that he had notice of the claim of the Fairbanks Company in ample time to protect himself. While he was still owing the Freeman Service Company a balance of $108 on the engine, he was notified by the attorney of the Fairbanks Company, of the Fairbanks Company's claim, and of the reservation of title in favor of the Fairbanks Company, and he paid the $108 to Covington, trustee in bankruptcy of the Freeman Service Company, with his eyes open, and under a guarantee from Covington that he would see him harmless.

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Brief for appellee.

J. S. Sexton, for appellee.

Two questions present themselves in this case. The first is, whether the state court should have taken jurisdiction of the matters in controversy after the adjudication in bankruptcy of the Freeman Service Company. The second is, whether the Fairbanks Company could assert title to the engine in the hands of Graves who had purchased it from a dealer, the Freeman Service Company, to which company the Fairbanks Company had sold the property with knowledge that it would be placed upon the market by the vendee. Both of these questions should be answered in the negative.

By a sort of comity which is more easily understood than defined, but which is necessary for the harmonious operation of two systems of courts, one state and one federal in the same territory, there has grown up in this country a system or rule whereby the court which first acquires jurisdiction of the subject matter through its trustee or receiver, retains exclusive jurisdiction of the same until the whole matter is settled in that tribunal. Smith in his excellent work on Receivers, p. 182, refers to this rule as follows: "The purpose of this rule is to secure an economical administration of the estate, a speedy winding up of the litigation, and a fair and equitable adjustment of the rights of all parties in interest. Where all conflicting parties can be drawn into the same jurisdiction, a much more comprehensive and intelligent adjudication can be had, and entire justice to all parties can be secured thereby." Turning to sec. 2 of paragraph seven of the Bankruptcy Law now in force, we find that one of the things required upon the bankruptcy court is to "cause the estate of bankrupts to be collected, reduced to money, and distributed, and *to determine controversies in relation thereto* except as herein otherwise provided."

It is in no sense correct, as contended by opposing counsel, that, because the Freeman Service Company had sold this engine prior to its adjudication as a bankrupt, therefore the trustee in bankruptcy, Covington, had no concern with the contro-

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versy. Only one-half of the purchase money, to-wit, $75, was due to the Fairbanks Company when the writ of replevin was sued out, the balance having been paid previously by the Freeman Service Company. The trustee in bankruptcy had the right either to resist all claim of lien on the part of the Fairbanks Company, or, if the lien should be conceded, to pay the $75 balance due the Fairbanks Company, and collect the $108 which was due by Graves to the Freeman Service Company. And, accordingly, this whole matter should have been submitted to the court of bankruptcy, and not to the state court. That Graves knew of the claim of the Fairbanks Company to the engine prior to the time he settled with Covington, the trustee in bankruptcy, in no way affects the rights of parties to the controversy.

Considering, now, the second question, whether the Fairbanks Company could assert title to the engine in the hands of Graves, we insist that Graves' character as an innocent purchaser was fixed when he made the purchase of the engine from the Freeman Service Company. He testified, without dispute, that the first hint he ever had that the Fairbanks Company had reserved title to the engine, was from what Wilson, attorney for the Fairbanks Company, told him, and this was after the proceedings in bankruptcy had been instituted.

It has never been doubted in this state, since the decision of this court in *Columbus Buggy Company* v. *Turley,* 73 Miss., 529, s.c., 19 South., 232, that "a vendee of goods under a contract that reserved title in the vendor until payment is made, but also by its terms confers a right upon the vendee to resell the same, has the power of disposition in respect thereto, and a creditor of the vendee who purchases the goods in satisfaction of his indebtedness, without notice of the vendor's claim, acquires title to the same." And if the circumstances surrounding any transaction are such that a vendor must have known that the vendee intended to resell the goods, or was buying them

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for resale, the same rule applies regardless of whether the privilege was inserted in the contract or not.

It is abundantly shown that the Freeman Service Company was engaged in electric work, doing contracting work, etc.; that it had on hand three or four contracts, one at Utica, one at Rosetta, one at Hazlehurst, and one at Ruleville, and that it was a bidder whenever electric work or electric engineering was to be done.

The action of the lower court should not be disturbed.

MAYES, J., delivered the opinion of the court.

The record in this case does not warrant the conclusion that the Fairbanks Company sold this gasoline engine to the Freeman Service Company for the purpose of having it resold, or that it knew it was the intention of the Freeman Service Company to resell, or had knowledge of any such facts as would bind it with constructive notice of the intention of the Freeman Service Company to resell. This being the case it does not fall within the rule announced by the case of *Columbus Buggy Co.* v. *Turley,* 73 Miss., 529, 19 South., 232, 32 L. R. A., 260, 55 Am. St. Rep., 550. All the cases on this subject are reviewed in the case of *Watts* v. *Ainsworth,* 89 Miss., 40, 42 South., 672. There is nothing in the law which prohibits one merchant from selling an article of merchandise to another merchant, with reservation of title until the purchase money is paid, unless the article sold is meant to be resold, or is of such character as that it may be fairly inferred, when the sale is made, that the purpose of the purchase is to resell it. No absolute rule controling this subject can be laid down by this court, but each case must depend upon its own facts; and we only say that in this case we are not warranted in the conclusion that the Fairbanks Company sold this engine for purposes of resale, or that the character of the property sold was such as to bind it with notice of the use the purchaser intended to make of the property; nor are there such

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facts in this record as would warrant the court in concluding that the Fairbanks Company had actual or constructive notice of the intention of the vendee.

If the trustee in bankruptcy has any right in the subject-matter of this litigation, this record is not in shape for it to be asserted by him.

It is to be hoped that the next legislature will put an end to the sale of personal property with reservation of title in the vendor, whereby the vendee is clothed with all the indicia of ownership, authority, and control over the property, and yet in truth does not possess the title. In order to make these contracts effective as to third parties, and prevent many wrongs being perpetrated on innocent parties under this character of contract, the legislature should require them to be recorded in the same manner as deeds of trust are required to be recorded, and, in default of such recordation, they should be held void as to innocent third parties. Cases of this nature are frequently coming to this court, and the evil effect of this kind of contract is made more and more manifest.

The learned circuit judge should not have given the peremptory instruction. Therefore the case is reversed and remanded.

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Statement of the case.

NAPOLEON HAYWOOD v. STATE OF MISSISSIPPI.

[43 South., 614.]

1. CRIMINAL LAW AND PROCEDURE. *Murder. Evidence.*

Where the accused in a prosecution for murder resting entirely on circumstantial evidence has introduced testimony which would prove an alibi, if credited, it is error not to admit evidence to the effect that disreputable characters in whose company the deceased had been on the night of his death left the state on the following day.

2. SAME. *Circumstantial evidence. Instruction.*

Circumstantial evidence is inferior to the testimony of eyewitnesses, and it is error to instruct in a murder trial, where the evidence for the defense would prove an alibi, if credited, that it is as good as any other kind of evidence and that whenever it generates full conviction of guilt beyond a reasonable doubt, the jury should act on such evidence as readily as on any other.

FROM the circuit court of, second district, Perry county.

HON. WILLIAM H. COOK, Judge.

Haywood, the appellant, and another, were indicted for the murder of one Lydell; there was a severance, and appellant was separately tried, convicted of the murder, and sentenced to the penitentiary for life, from which conviction and sentence he appealed to the supreme court.

The dead body of Lydell was found in a pond in the vicinity of Hattiesburg. The appellant and one George Shelton, both negroes, were arrested, and subsequently indicted for murder. On the trial of appellant it appeared that deceased, on the evening before his death, was intoxicated, harassed by financial troubles and vexed by litigation; that he had been out of work for several weeks; and, on the evening mentioned, he employed the appellant, a hack driver, to carry him to a house of ill fame, where he drank whiskey in company with the in-

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Brief for appellant.

mates of the place, after which he left, riding in the hack, driven by another than appellant, and his body was subsequently discovered in the pond. Physicians were introduced as witnesses on the trial and their testimony conflicted as to whether judging from the condition of the body when taken from the water and examined by them, the deceased was alive or dead when put in the pond. There was sufficient testimony, if credited, to have proved an alibi for appellant.

Gertrude Evans, an inmate of the resort, after testifying that Lydell, the deceased, in company with one Tutt and another person, spent some time at the place in company with several of the women, was asked by counsel for appellant if these persons had left Hattiesburg, and why they left; whether some of the women who were at the resort that night left the next morning for Birmingham, Alabama; and whether the women who were present that night were absent the next day. To all of these questions the state objected, and the objections were sustained.

Luther James, for appellant.

The evidence under which appellant was convicted was all circumstantial. And, for this reason, it was error in the lower court to refuse the defense the right to show by the appellant's witness, Gertrude Evans, an inmate of the house of prostitution, that she knew that some of the women who were at the house of prostitution on the Thursday evening when the deceased was there, left early the next morning for Birmingham, Alabama. This witness was also not permitted by the lower court to answer the question, propounded by counsel for appellant, whether she did not know that the women who were inmates of the resort had practically all left the state by the next day. It is apparent that her answers would have shown that the inmates of this resort where Lydell was last seen alive by reputable witnesses had left the state on the morning after the alleged murder, and have not since been in this state. Such proof was

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Brief for appellant.

material in view of the connection of the time and place when and where deceased was last seen alive, according to the evidence.

The court erroneously granted an instruction for the state to the effect that circumstantial evidence in law is as good as any other kind of evidence, and that whenever circumstantial evidence rises high enough in the scale of belief to generate full conviction in the minds of the jury of the guilt of the defendant beyond a reasonable doubt, the jury should act upon such evidence as readily as they would in any other kind of evidence. *Pitts* v. *State,* 43 Miss., 472; *Bourn* v. *State,* 5 South. Rep., 626. The testimony should have been left to the jury unfettered by an instruction pointing out, as it were, the conclusion desired by the district attorney. The true test of the weight of circumstantial evidence is that it excludes all reasonable doubt of the defendant's innocence. *Beavers* v. *State,* 58 Ind., 530; *Algheri* v. *State,* 25 Miss., 584; *James* v. *State,* 45 Miss., 572.

The case should be reversed on the facts, as was the case of *Allen* v. *State,* 40 South. Rep., 744, wherein this court laid down the proposition that in a case supported entirely by circumstantial evidence, where no motive is shown, a verdict of guilty, in the face of unimpeached testimony for the state, would, nevertheless, be reversed.

A. C. Cherry, on the same side.

The evidence does not connect appellant with the death of Lydell in sufficient degree to show that appellant was in any way guilty of Lydell's death. Under the evidence, Lydell may have come to his death: (1) From death by natural means in the house of prostitution, and have been subsequently placed in the pond by the frightened inmates; or (2) from having walked by inadvertence over the steep bank of the pond, and been drowned before he could, in his drunken condition, save himself; or (3) he may have committed suicide, being worried by his financial troubles and grieved over the death of the

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Opinion of the court.

party whose funeral notice was found in his pockets afterwards; or (4) he may have been put in the pond and there drowned by some one who thought he was dead, and who never intended to murder him. These are not unreasonable deductions from the evidence. *Robinson* v. *State,* 16 Tex. App., 347.

The action of the lower court in refusing to permit the witness, Gertrude Evans, to testify that all of the inmates, suddenly, without notice or warning, did the irregular thing of fleeing to another state the day after Lydell was at the resort, was error. This was a resort where intoxicants were sold; where prostitutes stayed; which Lydell had, all the day long, been making his base of operations, buying whisky and beer to excess, and where he was last seen by different persons, in company with a woman of the place.

The instruction for the state, criticised in the brief of my colleague, is certainly erroneous, under the circumstances. It is a dangerous thing, in any instance, to convict a man on circumstantial evidence alone. Moreover the instruction is argumentative. The weight and sufficiency of the evidence is for the jury alone.

George Butler, assistant attorney-general, for appellee.

Although complaint is made by appellant as to the action of the lower court in excluding the proffered evidence of the witness, Gertrude Evans, we submit that the evidence in no way connects the parties, concerning whom inquiry was made, with the murder; nor does it show that they were present at or near the scene of the homicide; and hence it was, therefore, immaterial whether these parties were within or without the state.

It is doubtful whether the instruction granted to the state, and of which complaint is made by appellant, was in any way prejudicial to the appellant. *Dean* v. *State,* 85 Miss., 40, s.c., 37 South., 501; *Browning* v. *State,* 30 Miss., 656.

WHITFIELD, C. J., delivered the opinion of the court.

The case is one of the most mysterious we have ever had to

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examine. Whether Lydell was dead or alive when his body was thrown into the pond, and, if dead, when and where and by whom and under what circumstances he had been killed, is left in absolute uncertainty and mystery by this record. Whether he got into a difficulty with the two white men, who according to some of the testimony were quarreling with him about $15 which they claimed he owed them, or whether the defendant and Geo. Shelton killed him, or, having nothing to do with killing him were hired to dump his body into the pond, no man can, with any satisfaction, tell from this record. The physicians who were introduced are in conflict as to whether, from the condition of the dead body when examined, the deceased was alive or not when put into the pond. If the testimony for the defense is to be believed, Haywood has proved a clear alibi. If there is one thing that may be said to appear with certainty, it is that Lydell and Haywood were both thoroughly drunk by seven o'clock on the Thursday evening before he was killed. It appears from the testimony of Davis that Lydell was in great financial trouble, was in litigation, had been out of work three or four weeks, and that, though he had not taken a drop of whisky in said three or four weeks, he on that day acted, to quote his language, "very foolish and crazy." This case is one depending on absolutely circumstantial evidence, and in this uncertain state of the testimony the court refused to permit the defense to show by the witness Gertrude Evans whether she knew that some of the women who were at the house of prostitution Thursday night left the next morning for Birmingham, Ala., and whether she knew that some of the parties who were in that house that Thursday night left the state the next day, and whether she knew that the same women that were there that night were not there the next day. It is clearly shown by the evidence that the deceased had been to this house two or three times that day, and that he had gotten money from Mrs. Davis, the wife of his landlord, who kept his money for him, three times that day, the last time about seven o'clock in

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the evening, and immediately left his boarding house. It is altogether probable that he returned to this house of prostitution, and, so far as this evidence discloses, there is nothing to show, if he did so return, what happened to him thereafter at that house. We think, in the very peculiar circumstances surrounding this man's death, the court should have allowed these questions to have been answered. Light might very probably have been thrown on the transaction, and the mystery satisfactorily cleared up.

The court also gave for the state the following instruction:

"The court instructs the jury for the state that circumstantial evidence in law is as good as any other kind of evidence, and, whenever circumstantial evidence rises high enough in the scale of belief to generate full conviction in the minds of the jury of the guilt of the defendant beyond a reasonable doubt, the jury should act upon such evidence as readily as they would in any other kind of evidence." We think the statement that circumstantial evidence, in law, is as good as any other kind of evidence, is a fundamental misconception, and in this case was fatal error, and most probably misled the jury in making up their verdict. It is undoubtedly true that, when circumstantial evidence excludes every other reasonable hypothesis than that of guilt beyond all reasonable doubt, the jury should convict; but it is equally true that, where the evidence is positive and direct by eyewitnesses to a killing, that kind of evidence, thus establishing the killing, is not the same kind of evidence as evidence wholly circumstantial from which the killing may be deduced. Circumstantial evidence is a different kind of evidence, wholly different from evidence consisting of the direct and positive testimony of eyewitnesses. In the one case, if the jury believe the testimony of the witnesses, the fact of the killing is established by their direct statements that they saw the party killed. In the other case, if the jury believe the party was killed beyond all reasonable doubt, they do so believe it from a chain of circumstances, the absence of any one link in which

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chain destroys the value of all other circumstances, no matter how absolutely proven. There has never been a better illustration of the weakness of circumstantial evidence than that which tells us that "it is no stronger than the weakest link in the chain." This essential difference in the very nature of the two kinds of testimony, circumstantial and direct, is such and so clear that it is not the law that circumstantial evidence is as good as any other kind of evidence. True enough, if, as stated, the circumstantial evidence excludes every other reasonable hypothesis than that of guilt beyond all reasonable doubt, the jury are just as much bound to convict as if the guilt had been shown by the direct evidence of eyewitnesses; but this does not alter the fact that the inherent nature of the two kinds of evidence is different, nor the other fact that the only thing which invests mere circumstances with force of proof is the absolute exclusion of every other reasonable hypothesis than that of guilt. We are of the opinion, therefore, that the statement which we have criticised in this instruction is a fundamental misconception, and, in this character of case, may most likely have mislead the jury and contributed materially to the verdict.

The clear difference between circumstantial evidence and direct evidence is pointed out by Prof. Wigmore in the first volume of his work on Evidence (section 25), in a quotation from Wills on Circumstantial Evidence, cited with approval by him as follows: "The different writers, ancient and modern, on the subject of Evidence, have concurred in treating circumstantial evidence as inferior in cogency and effect to direct evidence, a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence." And Mr. Wills points out the fallacy of Mr. Paley's declaration "that circumstances cannot lie"; that fallacy being that, if you concede certain facts, of course the facts do not lie, but whether the facts existed depends on the truthfulness of the witnesses deposing to the facts. That is just the point we make. There may be ten links in the chain of circumstantial evidence offered to convict the defend-

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ant. Each one of these links, or circumstances, is testified to by witnesses; and the difference, therefore, is, where the question is whether the defendant killed the deceased, that, if the testimony be direct, the killing may be established by the clear testimony of a single eyewitness; whereas, if the evidence be circumstantial, a number of witnesses necessarily must be examined to make out every link in the chain, every circumstance in the series, before the jury will be warranted in deducing, from the circumstances, the conclusion that the defendant did the killing. The popular mind recognizes the essential difference. When the men constituting the jury are told by the court in so many words that circumstantial evidence is as good as any other kind of evidence, that declaration is tantamount exactly to telling the jury that there is no difference between the nature of circumstantial evidence and the nature of direct testimony, a wholly misleading statement. We have so often said that the old paths are the safe paths, and the correct charge in a case of circumstantial evidence has been so long crystallized and stereotyped, by decisions in this state and elsewhere, that it is astonishing that a charge containing this sort of statement should be experimentally tried.

It will not stand the test, and for the error in giving it, and for the error in refusing to allow the witness Gertrude Evans to make answer to the questions indicated, the *judgment is reversed, and the cause remanded for a new trial.*

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Statement of the case.

PLACEDE LIZANA *v.* JOHN H. LANG.

[43 South., 477.]

1. ASSAULT AND BATTERY. *Civil liability. Defense. Consent and Provocation. Code* 1892, § 1428.

The acceptance by defendant of plaintiff's challenge to fight and engaging in a fight in pursuance thereof, are unlawful, and the challenge affords no defense to a civil action for an assault and battery under Code 1892, § 1428, providing that in all trials for assault and battery, the defendant may give in evidence, in excuse or justification, any insulting words used towards him at the time by the person assaulted.

2. SAME. *Instruction.*

In such case, it appearing that defendant did not commit the act complained of at the time he was challenged to fight, but went one hundred and twenty-five feet, procured weapons from his desk and returned before striking plaintiff, it was error to give defendant's instruction to the effect that if plaintiff voluntarily entered into and provoked a quarrel with defendant, and used language inviting a fight, for the purpose of, and calculated to bring on a fight, he was not entitled to recover.

3. SAME. *Excessive beating.*

In a civil action for damages, the fact that the difficulty was provoked by plaintiff, affords no justification for an excessive assault and battery.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Lizana, appellant, was plaintiff in the court below; Lang, appellee, was defendant there. From a judgment in favor of defendant, plaintiff appealed to the supreme court.

Lang was mayor, and Lizana deputy marshal of Pass Christian. Lang was presiding in the municipal court when a party charged with some infraction of law asked a continuance, tendering a bail bond in the penalty of $100, signed by Lizana as a surety. Lang stated in open court that the bond was

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Brief for appellant.

worthless, and that in any event its penalty should be $250. Thereupon Lizana arose in the court room, saying that he wished to make a statement. Lang interrupted him, commanding him to sit down, adding, "I am running this court, and do not need any assistance." Shortly after adjournment of the court, when Lang came out of the court room, he was met by Lizana who inquired of him why he, Lang, was always "turning me down" in court. To this Lang replied, "Go away from me; you are beneath me; I do not want you in my court." Mutual criminations and recriminations ensued, resulting in a personal difficulty as stated in the opinion of the court, followed by a civil action by Lizana against Lang for assault and battery.

The jury returned a verdict in favor of Lang, the defendant, and the plaintiff, Lizana, appealed from the judgment predicated thereof, assigning as error the action of the lower court in granting the first and third instructions asked by the defendant.

J. H. Mize, for appellant.

The granting of the first instruction asked by appellee, defendant below, was reversible error. There are two grounds of objection to the instruction. The first is, that it was not based on the evidence, for there was no evidence that Lizana was armed with a deadly weapon. On the contrary, it is evident, from Lang's own testimony, that Lang did the challenging, invited Lizana to go on the beach and shoot it out, and that Lang at once rushed back to his home, and armed himself with two pistols, and then rushed back to where Lizana was, Lizana having been in the meantime placed under arrest, and that he struck Lizana without any provocation on Lizana's part, Lang being at the time veritably a walking arsenal. The second objection to this first instruction for defendant is, that it appears to be based on the theory that a duel was about to be fought between the appellant and the appellee, and does not announce a correct proposition of law. If appellee accepted a challenge to fight a duel, he would be precluded from any de-

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Brief for appellee.

fense whatever, and if he had shot and killed Lizana, he would have been guilty of murder under our law. The evidence shows that whatever challenging there was was done by Lang, who immediately thereafter went off and armed himself with two pistols, and on returning struck Lizana and attempted to shoot him with the other while Lizana was under arrest and disarmed.

The court also erred in granting the third instruction asked by appellee. This instruction is wrong because it told the jury to find for the defendant, Lang, if they should believe from the evidence that Lizana used language calculated to bring on a fight with Lang, without telling the jury what amount of force Lang could use to avenge such insult. This instruction, in effect, authorized the defendant, if he was insulted by plaintiff, to go to his house one hundred and twenty-five feet away, constitute himself a walking arsenal, break away from those seeking to restrain him, return to where appellant was, and strike appellant with a deadly weapon. This is not the law. See *Skidmore* v. *State,* 43 Tex., 93; *Stone* v. *Heggie,* 82 Miss., 410, s.c., 34 South., 146; *State* v. *Huntley,* 91 N. C., 617; *People* v. *Rodrigo,* 69 Cal., 601.

Bowers, Griffith & Leathers, and *McWillie & Thompson,* for appellee.

The first instruction granted for the defendant, Lang, is assailed by counsel for appellant, plaintiff below, on two grounds; first, that there is no evidence to support it, and, second, that it erroneously states the law. In other words, the appellant proceeds on the theory that there is no evidence that Lizana, either in words or by acts, invited Lang into a difficulty. We are at a loss to see how this can be contended. The evidence shows that Lizana waited without the court room to "get satisfaction" from Lang. Lizana's testimony shows that he was seeking a fight. Lang's testimony shows that Lizana abused him after Lang had refused to discuss matters with him, and that Lizana

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reiterated his intense desire to give Lang "satisfaction." As regards the contention that the instruction is erroneous in law, we do not think this court will seriously consider this. While both parties in challenging and accepting a challenge respectively were guilty of an infraction of law, we submit that, as concerns their relation to each other, they were in *pari delicto* and neither could invoke the law as to the other. We hardly think it necessary to discuss seriously the proposition that one man is entitled to recover, civilly, against another for injuries which he sustains in the course of a difficulty into which each had entered wilfully and knowingly. Of course there may be cases where the force used is altogether disproportioned to the character of the combat that may to some extent vary this rule, though on that point we have doubts, but there is no suggestion of anything of that sort in this case. Indeed, the assault and the injury inflicted were extremely light, considering the situation of parties, character of combat and arms possessed by each.

The criticism of the third instruction for defendant is on practically the same grounds as applied to the defendant's first instruction. The observations above made apply with equal force to this third charge. The only additional point made by appellant as to this instruction is that the record shows that Lang went to his house, and that the difficulty which Lizana had provoked was ended by his momentary departure. In the light of the facts this objection is manifestly untenable. The distance from where the combatants first stood to the house was only about one hundred and twenty-five feet, only a street intervening; and, with his blood up and his passions aroused, Lang rushed for his weapon, and continued a difficulty which never had ceased. It was all one transaction. There was no cessation or time for cooling off.

This case is peculiarly like that of *Galbraith* v. *Fleming*, 27 N. W. Rep., 581. In that case the defendant called on plaintiff to repeat some language which he had used in his absence

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and which the plaintiff did repeat, and the court treated the first utterance together with the ensuing difficulty as one entire controversy.

MAYES, J., delivered the opinion of the court.

The trial court erred in giving the first and third instructions asked by defendant.

By the first instruction the jury are told that "if they believe from the evidence that Lizana waited for Lang to come out of the town hall for the purpose of provoking a difficulty, and that when Lang came out Lizana accosted him and began a quarrel, and that Lizana, during the course of the quarrel, challenged Lang for a fight, and that Lizana was then armed with a deadly weapon, and that Lang thereupon immediately armed himself and accepted the challenge, and the blow was struck by Lang in an altercation that thereupon then and there ensued, they shall find for the defendant." Section 1428, Code 1892 provides that "in all trials for assault and battery, or for an assault, the defendant may give in evidence, in excuse or justification, any insulting words used by the person on whom the assault, or assault and battery was committed, at the time of the commission thereof, towards the defendant," etc.; but neither in this statute, nor in any other authority which we have been able to find, has it ever been held that the acceptance of a challenge to fight, and voluntarily engaging in a fight by one party with another, because of a challenge so to do, can be set up as a defense in a civil suit for damages for an assault and battery. The fighting under a challenge is unlawful, and affords no justification to either party, and any assault and battery so committed is both a criminal offense and a civil liability. The facts in this case show that plaintiff and defendant engaged in a wordy battle on the street, indulging in many epithets towards each other; that the defendant left the plaintiff where the altercation had occurred, and went about one hundred and twenty-five feet, to where his home was, and got two pistols,

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placing one in his pocket, and keeping the other in his hand. While the defendant had gone after his pistols, plaintiff was placed under arrest by an officer. Defendant returned to where plaintiff was, having a pistol in his pocket and one in his hand, invited plaintiff to come on, and, when he started, struck him with the pistol. The testimony shows that defendant was so eager to get at plaintiff that he jerked loose from a party who tried to stop him, while he was returning from his house with the pistols, and, when one of the pistols was taken away, he drew another. In a suit for damages for an assault and battery, the defendant must show that he is without fault; but this cannot be done by showing that he engaged in the fight because his adversary challenged him to do so. It takes proof of facts other than this to show justification. 3 Cyc., p. 1070, note 62.

The third instruction for defendant tells the jury, "if they believe from the evidence that plaintiff voluntarily entered into and provoked a quarrel with defendant, and that plaintiff then and there used language inviting a fight, for the purpose of and calculated to the bringing on of a fight, then the plaintiff is entitled to nothing, and the jury should so find." This instruction, on the facts in this case, is erroneous. It might have been good as an announcement of the law, if the battery had been committed at the time the testimony shows the provocation occurred; but defendant did not then commit the assault and battery complained of. On the contrary, the testimony shows that after the provocation defendant went one hundred and twenty-five feet to his home, and into his desk, procured weapons, and returned to where plaintiff was and then committed the assault and battery. He had ample time for deliberation and reflection before returning to resume the quarrel. We do not want to be understood as saying that the above instruction is good in every case where one is sued for an assault and battery, but that this instruction might have been good in this case if the facts had supported it. Even in a case where the plaintiff provokes a difficulty, if the battery is excessive or unreasonable, the

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Brief for appellant.

fact that the difficulty was provoked by the plaintiff can afford no justification to the defendant.

Reversed and remanded.

THADDEUS V. LADNIER *v.* PATRICK R. LADNIER.

[43 South., 946.]

STATUTE OF FRAUDS. *Code* 1892, § 4229. *Sales of goods. Delivery.*

A verbal sale, involving no cash payment or understanding as to terms of payment, of a flock of sheep ranging in the woods, for four hundred dollars, is not saved from the statute of frauds, Code 1892, § 4229, by the delivery of three pet lambs not of the flock.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

Patrick, the appellee, was plaintiff in the court below; Thaddeus, the appellant, was defendant there. The suit was for the alleged value of a flock of sheep, four hundred dollars, which plaintiff claimed to have sold defendant "woods range delivery." The defense was predicated of the statute of frauds. From a judgment in plaintiff's favor defendant appealed to the supreme court. The facts sufficiently appear in the opinion of the court.

E. M. Barber, for appellant.

The part of our statute which bears directly on the acts of the appellant relative to the purchase of the sheep is that he must have received at least a part of the sheep to have made the agreement binding, as there was no money paid nor memorandum in writing signed by him. The question then to be decided is, did the appellant receive the sheep or any part thereof at the time of the alleged agreement. There is no evidence that he ever performed any act after the time of the alleged

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Brief for appellee.

sale that could in any way be considered even tending towards his acceptance and receiving the sheep.

On the question of delivery, see *Moore* v. *Love*, 57 Miss., 765; *Daniel* v. *Frazier*, 40 Miss., 507; *Berry* v. *Waterman*, 71 Miss., 497, s.c., 15 South., 234; *Hinchman* v. *Lincoln*, 124 U. S., 337; *Shindler* v. *Houston*, 49 Am. Dec., 316.

J. H. Mize, for appellee.

In *Smith* v. *Sparkman*, 55 Miss., 652, this court holds the rule to be in such case: "Much depends on whether all has been done about the property which the parties intended, and whether the commodity was *in esse* at the date of the contract, in condition to be delivered. These considerations furnish valuable tests to determine whether the contract is an absolute sale, or executory."

In the instant case, we contend that all had been done about the property which the parties intended. The sheep were running on the range and were never penned except in shearing time; the parties made the contract of sale and then went out to where these three pet sheep were lying in an enclosure under a dogwood tree; they went close enough to the sheep to cause them to get up, and appellee, the vendor, pointed them out to appellant, the vendee, saying that his father wanted these three pet sheep and that he would like appellant to sell his father said sheep, and appellant said that appellee's father could have the sheep. This, together, with the acts of ownership exercised by appellant in saying that he would shear the sheep, as before set out, and his statement to Mrs. Ladnier and to Zeno that he had bought appellee's sheep, justified the jury in finding the verdict they did.

The cases cited by appellant in his brief are so foreign to the principle involved in the instant case that even those unlearned in the law can see their inapplicability, and we will not therefore discuss same, contenting ourselves with citing a few cases which we think are illustrative of the principle involved

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in this case. *Brown* v. *Wade,* 42 Iowa, 647; *Calkins* v. *Lockwood,* 12 Conn., 154; *Calvin* v. *McKenzie,* 21 Ore., 184; *Ross* v. *Welsh,* 77 Mass., 235; *Johnson* v. *Watson,* 1 Ga., 348; *Lar* v. *Newell,* 25 Cal., 545.

Argued orally by *E. M. Barber,* for appellant.

CALHOON, J., delivered the opinion of the court.

The wisdom of the statute of frauds is proved by more than two centuries of experience. It has been said that it "carried its influence through the whole body of our civil jurisprudence, and is in many respects the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights." 2 Kent, Com., 494, note "a." No part of it is of more importance for protection in the daily concerns of life than the clause invalidating oral contracts of sale of personalty for above $50, unless there is receipt by the buyer of all or part of it, or actual payment of all or part of the purchase price. In order to enforce such a contract it must be satisfactorily shown that there was an agreement of the minds of the parties selling and buying to the precise terms of the contract, and that something of earnest money was actually paid or secured on that contract, or that the property, or part of it, was actually delivered to and accepted as upon that contract by the buyer. If the delivery be of part for all, this constructive or symbolical delivery must plainly appear.

In the case before us it is difficult to repose quietly on the belief that there was an agreement of the two minds that the sale was concluded. No money was paid; no writing made; no clear and distinct understanding had as to the terms and times of payment. The whole reliance of the seller here is on a constructive delivery of three sheep for a flock in the range, whose number is not known, and the three were not of the flock in the range, but pets near the house. It seems very clear that there was nothing said at the barn to take the agreement from under

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the operation of the statute of frauds. The plaintiff's own testimony was: "He said, 'You will sell me all the sheep at $400, and turn them over to me, woods range delivered,' and I said, 'Yes,' and he said, 'You consider it a trade,' and I said, 'Yes,' and he said, 'I will take them,' and that is where he shook me off. I wanted my money for them, and told him the richest man in the world would not refuse money. 'Woods range delivered' means a trade with them on the range, without penning them up; just take them as they are standing. There were two or three of the sheep my father wanted to buy from me, and I did not sell them to him. I did not want to sell two or three, without selling the rest of the flock, and I told him, if he would be kind enough to let my father have them, he would pay him for them, and that I would appreciate it; and he said he would let the old man have them. He said: 'You show me the sheep. You may be off when I come after them, and I want to know which ones to leave here for the old man.' And so we walked on around. The sheep were lying under a tree." It further develops, by a fair construction of the testimony of the plaintiff himself, that he was to turn over to appellant the marks and brands, which was never done. We cannot subscribe to the assumption that the evidence shows any acceptance and delivery of the three sheep as representative of the herd wandering in the range. The appellant absolutely denies that the trade was concluded.

We have examined the authorities cited by counsel on both sides, and now refer to the very elaborate notes to *Shindler* v. *Houston,* 49 Am. Dec., 325, *et seq.* We quote from page 329: "There must be, on the one hand, a delivery by the vendor with intent to vest the title and legal possession in the vendee, and, on the other hand, there must be, not only an actual receipt of the goods, or some part thereof, by the vendee, but also some act or conduct on his part clearly indicating an intent to accept them as owner in performance of the parol contract." To this MR. FREEMAN cites a large number of cases. On page

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Brief for appellant.

331 he cites many cases supporting the position that the vendor's lien must be divested by the receipt and acceptance in order to keep without the statute. So, if we turn this case around, and suppose that the buyer had sold the sheep to a third party, and inquire whether that party could succeed in an action of replevin against the seller on the evidence in this record, we must answer, "No," and the one involves the other.

Reversed and remanded.

JESSE B. CLARK v. INGRAM-DAY LUMBER COMPANY.

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[43 South., 813.]

TIMBER. *Deed. Time limit.*

The grantee in a deed conveying timber and giving a limited time to remove the same, has no right after the expiration of the time to enter upon the land even to remove logs previously cut.

FROM the circuit court of Harrison county.

HON. WILLIAM H. HARDY, Judge.

The lumber company, the appellee, was plaintiff in the court below; Clark, the appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The facts are fully stated in the opinion of the court.

W. G. Evans, and *H. Bloomfield,* for appellant.

The appellee had no right of action against the appellant for the reason that the controlling clause in the timber lease plainly means what it expressly declares, which clause is couched in the following words:

"It is further agreed to give the Gulf Coast Lumber Company three years to remove the saw logs from the above described land, from the 21st day of July, 1903"; therefore the

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Brief for appellee.

time expired on the 21st day of July, 1906, and the proposition contended for by appellees that under the lease appellees had the right to remove the saw logs after the 21st of July, 1906, or to claim any property in them is utterly untenable.

There is nothing more certain than that the three years clause mentioned in the timber lease, fixes by a contract the expiration of the right of appellee to remove the saw logs from the land.

It is well settled that "The intention must prevail." *Robinson* v. *Payne,* 58 Miss., 692; *Hall* v. *Eastman, etc., Co.,* 89 Miss., 588; s.c., 43 South., 2.

Money & Graham, for appellee.

The right of appellee to remove personal property consisting of logs cut and manufactured from the land before the time expired, after July 21, 1906, is quite different from the right and title in the logs themselves cut on the land that date. *Hoit* v. *Stratton Mills* (N. H.), 20 Am. Rep., 124.

We think counsel mistake the holding of this court in the *Hall* v. *Eastman* case, 89 Miss., 588, s.c., 43 South., 2. There was an express provision in that deed that it should be null and void at the expiration of the time mentioned therein, which the court declared was the controlling provision in the instrument, and that no question of forfeiture was involved in the case; beyond the question just stated there was no other in the case except to decide that the grantee in that deed should commence cutting within a reasonable time, the parties not having provided for it. There is no analogy between the instruments in that case and this, *a priori,* none between the points involved in the two. If the court in that case intended to express any opinion or leaning upon the questions involved in this case, by the citations therein of the cases from Minnesota, *Mathews* v. *Mulvey,* Maine, *Pease* v. *Gibson,* Michigan, *Ferguson* v. *Arthur,* Georgia, *McRae* v. *Stillwell, Perkins* v. *Peterson,* we call attention to the later cases

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Brief for appellee.

from the same states in favor of our contention, to-wit: *Alexander* v. *Bauer* (Minn.), 102 N. W. 387; *Erskine* v. *Savage* (Maine), 51 Atl., 242; *Hodges* v. *Buell* (Mich.), 95 N. W., 1078; *Johnson* v. *Truitt* (Ga.), 50 S. E., 135; *Null* v. *Elliott* (Ga.), 43 S. E., 173.

There is a line of strong authorities in Indiana, New Hampshire, New Jersey, Michigan, Pennsylvania and Alabama, holding in construing conveyances of standing timber not materially distinguishable from the one at bar, that the title to the timber conveyed is absolute, and remains in the grantee, even as to the standing timber, or trees, after the time limit mentioned in the instrument has passed—though without legal right in the grantee to enter the close of the grantor to take and remove the trees left standing on the land without objection himself to such damages as he might cause should he do so. And while it is possibly not necessary for the court here to hold to the extent these cases have gone, in this case, yet the cases below are cited separately to call the court's attention to the middle ground occupied by appellee in the case at bar, and we believe that there will hardly be found a case wherein, under the same facts and instruments that we have here, it is held against appellee's position. The cases above referred to are the following: *Halstead* v. *Jessup* (Ind.), 49 N. E., 821; *Hoit* v. *Stratton Mills* (N. H.), 54 N. H., 109, 20 Am. Rep., 119; *Irons* v. *Webb* (N. J.), 41 N. J. Law, 203, 32 Am. Rep., 193; *Hodges* v. *Buell* (Mich.), 95 N. W., 1078; *Bennett* v. *Victor Lumber Co.*, 28 Pa. Sup. Ct., 495; *Magnetic Ore Co.* v. *Marbury* (Ala.), 104 Ala., 465, 16 So., 636, as construed in *Zimmerman Mfg. Co.* v. *Daffin*, 42 So., 858 (Ala.)

The leading case cited adversely to the views announced in *Zimmerman Mfg. Co.* v. *Daffin, supra,* is the early case of *Pease* v. *Gibson*, 6 Me., 81, construed in *Webster* v. *Proctor*, 36 Atl., 631, by the supreme court of Maine in 1896, which uses language as follows:

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Brief for appellee.

"In that case there was a sale under seal of all pine trees fit for mill logs on certain land, the vendee to have two years from date to take off said timber. It is contended that there is an absolute sale of all timber on the land, and not merely of such as the vendee should get off during the two years, and that the limitations to that term of time was only an indication of the period within which he might enter and carry away timber without the payment of damages. But the court held that it was a sale of only so much of the timber as the vendee should cut and remove within the two years."

In *McIntire* v. *Bernard,* 1 Sand. Ch., 52 (Me.), decided upon the authority of *Pease* v. *Gibson,* there was a grant of all the pine timber standing and lying on a certain tract of land, with the right of entering upon the land until a certain date to cut and remove the timber. It was held that the grantee had no right nor interest in the standing pine timber after that date, and must account for all cut and removed thereafter.

In *Donworth* v. *Sawyer* (Me., 1900), 47 Atl., 521, which was a case in trover, it is said:

"In this state and some others, the conveyance of growing trees to remain alive upon the land, and to be cut in the future, is a conveyance of an interest in land that may nourish and support the growth conveyed. The trees became chattels only when severed from the soil. Until then they are a part of it." Citing *Dunn* v. *Burleigh,* 62 Me., 24; *Hoit* v. *Stratton Mills,* 54 N. H., 109; *Howe* v. *Bachelor,* 49 N. H., 204; *Pulmer* v. *Prescott,* 43 N. H., 277; *Heflin* v. *Bingham,* 56 Ala., 566; *Clap* v. *Draper,* 4 Mass., 2666; *White* v. *Foster,* 102 Mass., 375.

It is further said in said case:—

"It is not, as before said, a strained construction to hold that ordinarily a grant of growing timber to be construed most favorably to the grantee, conveyed the growth named, with its increase, until the time for removal shall have elapsed. This

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Brief for appellee.

seems to be the view taken in *Pease* v. *Gibson,* 6 Greenl., 81, although other questions were decided."

In *Emerson* v. *Shore,* 49 Atl. (Me.), 1051, decided in 1901, the same doctrine is announced as that stated in *Erskine* v. *Savage,* 51 Atl., 242 (Me., 1901), as follows:

"It is settled law in this state that a sale by parol, of growing wood, with the right to enter upon the land to cut and remove the trees within a specified time, is an executory contract merely, for the sale of the wood after it has been severed from the soil, with a license to enter upon the land for the purpose of cutting and removing it; that the rights of the parties rest wholly in contract; that the wood remains a part of the real estate until severed; that until it is severed the title does not pass to the vendee; and that as soon as severed, within the period limited, it becomes personal property and the title then vests in the vendee. It is also settled that, if it is not severed until after the expiration of the period, title does not pass to the vendee; but in such case, if he enters to sever or remove it, he becomes a trespasser."

The Case of *Pease* v. *Gibson,* with a number of others, is cited, and it will therefore be seen that while the case of *Pease* v. *Gibson* may be considered as holding contrary to the cases above cited by use, it is not against our contention in this case that the timber, having been severed from the soil by the appellee within the period mentioned in the Cowart deed, had become its property by converting the same into personalty.

The question at bar is not as to standing timber, however, but to the logs in controversy in this suit, which were cut down and manufactured into saw logs by appellee before July 21, 1906.

Cutting the trees from the land and converting them into saw logs constitutes a "removal" within the terms of the deed. *Macomber* v. *Detroit L. & N. R. Co.* (Mich.), 66 N. W., 376; *Hodge* v. *Buell,* 95 N. W. (Mich.), 1078; *Golden* v. *Glock* (Wis.), 15 N. W., 12; *Hicks* v. *Smith* (Wis.), 46 N. W., 133.

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Brief for appellee.

And they became appellee's property. *Heard* v. *James,* 49 Mass., 236.

The title has never been divested out of appellee, unless the expiration of the three years' provision in the deed divests it. That provision is totally unlike the provision in the instrument in the case of *Hall* v. *Eastman, Gardiner & Co., supra,* as before stated.

That the title has never divested out of appellee as to said logs, is fully sustained by the following authorities: *Pulmer* v. *Prescott,* 43 N. H., 277 (N. H.); *Hoit* v. *Stratton Mills,* 20 Am. Rep., 119 (N. H.); *Iron* v. *Webb,* 32 Am. Rep., 193 (N. J.); *Alexander* v. *Bauer,* 102 N. W., 387 (Minn.); *Hodges* v. *Buell,* 95 N. W., 1078 (Mich.); *Macomber* v. *Detroit L. & N. R. Co.,* 66 N. W., 376 (Mich.); *Golden* v. *Glock,* 15 N. W., 12 (Wis.); *Halstead* v. *Jessup,* 49 N. E., 821 (Ind.); *Erskine* v. *Savage,* 51 Atl., 242 (Me.); *Johnson* v. *Truitt,* 50 S. E., 135 (Ga.); *Giles* v. *Simmonds,* 15 Gray, 44, 77 Am. Dec., 373 (Mass.), and especially *Zimmerman Mfg. Co.* v. *Daffin,* 42 South., 358 (Ala.). This is the latest case we have been able to find on this subject.

The decisions like *Pease* v. *Gibson, supra, Williams* v. *Flood,* 63 Mich., 487, 30 N. W., 93, seem to have been determined on the doctrine of *ab inconvenienti. Hoit* v. *Stratton Mills, supra, Zimmerman Mfg. Co.* v. *Daffin, supra.*

Many of the earlier cases held that the covenant as to time divested the title to the purchaser, not only as to the timber not severed, but also that severed. The latter decisions, however, hold that the purchaser is entitled to all the timber severed within the time limit, and also has the implied right to enter and remove the same. *Null* v. *Elliott,* 43 S. E., 173.

Even where a deed to timber expressly provided that after the expiration of the time fixed "all timber left on the land is to revert" to the seller, the word "timber" was held not to include manufactured cross-ties. *Johnson* v. *Truitt, supra.*

Though possibly not essential to the question of the owner-

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Opinion of the court.

ship of the logs involved in this case, because the appellant himself removed them from the land, yet it is the law that under the facts of this case, appellee had the implied right to enter and remove them after July 21, 1906. *Macomber* v. *Detroit, etc., supra; Hicks* v. *Smith, supra; Golden* v. *Glock, supra; Halstead* v. *Jessup, supra; Johnson* v. *Truitt, supra; Giles* v. *Simmonds, supra.*

And certainly, as between holding the time limit clause to be an absolute forfeiture, and holding that the purchaser has an implied right to remove after the expiration of the fixed period, the latter would be adopted. *Macomber* v. *Detroit, etc., supra.*

The attempt of counsel for appellant in their brief to settle the question of ownership on the theory of supposed trespass by appellee, should he enter the land after the expiration of the three years, and as to any right lost by appellee by reason of any supposed negligence in failing to remove the logs, is fully answered contrarily by the following cases: *Erskine* v. *Savage, supra; Irons* v. *Webb, supra; Pulmer* v. *Prescott, supra,* and the other cases cited above.

MAYES, J., delivered the opinion of the court.

On the 21st day of July, 1903, D. H. & L. J. Cowart executed the following contract to the Gulf Coast Lumber Company, viz.: "In consideration of $350 cash to me in hand, I hereby sell and warrant to the Gulf Coast Lumber Company all saw log timber on the following land, to-wit: North half of northeast quarter (N. ½ of N. E. ¼) section one (1), township seven (7), range twelve; south ½ of section thirty-six, township six, range twelve west. It is further agreed to give the above Gulf Coast Lumber Company three years to remove the saw logs from the above-described land from this date. Witness our signature this the 21st day of July, A. D. 1903."

After the execution of the above contract the Gulf Coast Lumber Company conveyed all of its rights under same to the In-

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gram-Day Lumber Company. At the expiration of the time limited by the contract, the Ingram-Day Lumber Company had not removed all the timber from the premises as required by the contract; but prior to the expiration of the three years, and while their contract was in full force, they had cut down a lot of the timber, and this timber so cut down remained upon the land after the 21st day of July, 1906, and the date at which this contract expired. After the expiration of the contract, the Cowarts sold the timber then lying upon the premises described in the conveyance, and which had been cut by the Ingram-Day Lumber Company, to Clark, the appellant. It is agreed in the record that the value of these logs sold to Clark by the Cowarts was $250, and that, if Clark is liable at all, he is liable for this sum.

It would be difficult for a contract to be drawn more clearly evidencing the intention that the rights of the grantee should cease at the expiration of the time limited in the contract than this one does. There are a great many decisions upon this subject, and the courts are in conflict as to whether or not timber shall be considered to be "removed" within the meaning of the contract of this sort, when it shall have been severed from the soil and left upon the land. We prefer to align ourselves with those authorities which maintain the integrity of the contract and enforce it according to its clear intent and meaning, when interpreted according to the general acception of the words used, rather than to enter into any refined distinction as to what constitutes a "removal," and thereby bring into the contract interminable confusion. By the plain terms of this contract the timber is sold to the grantee on condition that it be removed from the premises within three years from the date of the instrument, and, the three years having expired without its having done so, it has no further right on the premises or to the timber, either standing or which it has cut down and left lying upon the land after the expiration of the time fixed by the contract for removal. By the terms of the contract it

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is given "three years to remove the saw logs from the above-described land," and a plain interpretation of this language means that it shall not only cut down, but that it shall take from the lands, the timber so granted, else its rights are terminated by the contract itself. The only safe way to construe this contract is to construe it according to the general understanding of the meaning of the words that have been used, and which show that it was intended to limit the rights granted by this contract to a period of three years, and no longer. Timber cannot be said to be "removed from the premises" unless it is carried off. This contract says that the logs shall be removed from the above-described premises in three years, and timber cannot be said to be "removed" from the premises when it is merely cut down and left lying on the lands.

If the parties had intended that the grantee under this contract should have any rights additional to those which are granted in the contract—that is to say, if it was intended that they should have three years within which to cut the timber, and an additional time in which to remove it from the premises—nothing would have been easier than for the parties to have put this in the contract; and, since they have not done so, we cannot say that the parties intended that the grantee should be limited to three years only as to the time in which he shall cut down the timber, and shall have an additional time in which to remove timber cut from the premises. To do this would be to make a new contract, and to disregard the agreement which the parties have actually made. In the case of *Boisaubin* v. *Reed,* 2 Keyes, 323, where the party had bought timber on certain land, with the right to enter for the purpose of cutting and carrying away the timber for and during the term of ten years, the court held that the party claiming under the contract could not enter upon the land after the expiration of the term limited in the contract, for the purpose of removing timber cut prior to the expiration of the term, and on page

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324 says: "The parties fixed the time within which the vendee or his representatives might enter the land and carry away timber. After the expiration of the term every entry upon the land for the purpose of taking timber away was without license of the deed. To hold to the continuation of the right to remove timber from the land, after the right for so doing which has been agreed on by the parties has expired, is to disregard their agreement or make a new one for them. It was the intention of the parties to the original agreement to limit the right to take and carry away timber, and the term within which the vendee or his representatives might lawfully enter upon the land; and the vendee has no title to the timber by cutting logs and leaving them upon the land, and to complete his title he must also remove the logs within the term." And again, on page 326, the opinion says: "The defendant cut down more timber than he could remove within his term. He knew that his right to enter and carry away expired at a particular date. He attempted to overreach the letter to his covenant, and must be allowed to bear his loss without remedy." This case has been adopted and approved in many cases.

All the cases which hold to the view that, notwithstanding there is a time within which timber sold must be cut and removed, yet the grantee in such an instrument, by severing the trees from the soil, has removed them within the meaning of the terms of such contracts, and that his rights are not lost by a failure to actually take the timber from the land within the period limited, cite back to the case of *Hoit* v. *Stratton Mills,* 54 N. H., 109, 20 Am. Rep., 119. We prefer the line of authority which adopts the case of *Boisaubin* v. *Reed* as containing the best decisions upon this subject. *Strong* v. *Eddy,* 40 Vt., 547; *Kellman* v. *McKinstry et al.,* 69 N. Y., 264; *Chestnut* v. *Green,* 86 S. W., 1122, 27 Ky. Law Rep., 838; *Saltonstall* v. *Little,* 90 Pa., 422, 35 Am. Rep., 683; *Jackson et al.* v. *Hardin,* 87 S. W., 1119, 27 Ky. Law Rep., 1110. In the case of *Adkins* v. *Huff,* 58 W. Va., 645, 52 S. E., 773,

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Statement of the case.

3 L. R. A. (N. S.), 649, in the notes will be found many authorities on this subject; and in this case it is stated, in the opinion of the court, to be found on page 652 of 3 L. R. A. (N. S.), page 774 of 52 S. E.: "By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract." It is further said on the same page: "No distinction seems to be made in this respect between the rights conferred by deed and those conferred by contracts which have not the forms nor all the requisites of a deed."

We are of the opinion that this case should be, and it is, reversed and remanded.

CITY OF GULFPORT *v.* NICHOLAS STRATAKOS.

[43 South., 812.]

1. SUNDAY. *Desecration. Fruit stand. Code* 1906, § 1367. *Merchant.*

The keeper of a fruit stand is a "merchant, shopkeeper or other person" within the meaning of Code 1906, § 1367, prohibiting the keeping open of stores on Sunday for the purpose of disposing of any wares, merchandise, goods or chattels.

2. SAME. *Necessity. Charity. Merchandise.*

The sale of fruit is not a work of necessity or charity; and fruit is merchandise within the meaning of the Sunday law.

FROM the circuit court of Harrison county.

HON. WALTER A. WHITE, Special Judge.

Stratakos, the appellee, was prosecuted and convicted in the police court of Gulfport for violating the Sunday law in that he kept open his place of business, a fruit stand, and did therefrom sell fruit on the Lord's day, commonly called Sunday, contrary to an ordinance of the city making all misdemeanors under the penal laws of the state an offense against the municipality. The fruit merchant appealed from the con-

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Brief for appellant.

viction to the circuit court, where upon an agreed statement of facts he was acquitted, and the city of Gulfport appealed to the supreme court. The facts are stated in the opinion of the court.

John L. Heiss, for appellant.

In all Christian nations Sunday, commemorating as it does the resurrection of Christ, has been regarded with veneration, and laws controlling the observance of same have in all instances been enacted. In England Sunday laws more or less stringent have existed from a very early period. In the year A. D. 1678, an act was passed in England, which has served as the foundation of all the laws that have since been enacted both in England and America. It provided that "No tradesman, artificer, workman, laborer, or other persons whatsoever shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's day, or any part thereof (works of necessity and charity excepted) and that no person or persons whatsoever shall publicly cry, show forth or expose to sale any wares, merchandise, fruit, herbs, goods or chattels upon the Lord's day or any part thereof." That is the law which has been in force in England and America practically all of the time since that date, and with no considerable changes is found upon our statute books to-day.

We do not believe the defendant can successfully contend that he is not a merchant or shopkeeper; but if he should so contend, then he must admit that he is included in the terms "other persons" which term means persons *ejus generis* with the first mentioned. We believe that the law contemplates every character of business where goods, wares and merchandise are traded, bartered, sold or bought, or offered for such purpose, and that the only exception to the operation of the law intended by the legislature was named, to-wit, the pharmacy or drug store.

Does the term wares and merchandise, goods and chattels

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used in the statute, comprehend in its significance, the stock of fruit in a fruit stand for sale to the general public? It seems to us, that no words of more general significance could be used than those used in the statute, and that they unquestionably comprehend every article of every description whatsoever that constitutes the whole, or a part of the stock in trade of a store or shopkeeper. If that be true, then the defendant has been guilty of a violation of the city ordinance.

It seems to us that the application of the principle of one of the primary maxims of interpretation, that the express mention of one thing implies the exclusion of all others will greatly aid in the interpretation of the law above quoted. Had the legislature intended that fruit shops should remain open on Sunday, and the stock of fruits sold to whomsoever desired to purchase, then such shops would surely have been included with the exceptions named, to-wit, the meat market, the ice house, and the drug store, etc.

Since the keeping open of a fruit stand on Sunday for the sale of fruit is not one of the exceptions named in the law, specifically, is it a work of necessity or charity? There is no element of benevolence or charity in such labor, or occupation, nothing to work to the good of an individual, or a number of people who stand in the need of assistance and it cannot be considered a work of charity. The alternative for us then is to consider the matters charged as being a work of necessity. And such indeed was the position of opposing counsel. They set up the defense that it was a work of necessity, and vigorously defended that position so far as they could by mere assertion, but not being able so far as we have been able to see, to offer anything in support of their contention. It is to be remembered that the offense charged is that the defendant kept open store (a fruit stand) for the purpose of selling fruit without any mitigating circumstances, or features that would make it a peculiar case. That being true, it cannot be that the article dispensed is necessary to the public;

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as for instance, medicine is necessary. The vocation cannot be deemed necessary; as for instance, the work of a physician is necessary. But it is claimed that in order to the preservation of fruit, and to prevent serious damage by decay, it is necessary to sell same, and to keep the shop open Sunday. The legislature surely did not so view it. The butcher shop whose products are subject to decay, was specifically excepted from the provisions of the law. If the sale of beef were a necessity would the legislature have had cause to name the exception? Evidently the legislature did not so view the sale of beef on Sunday. The mere fact that the product is perishable, does not constitute the sale of same a necessity within the purview of the law. In *State* v. *Goff,* 20 Ark., 289, the defendant's grain was wasting from overripeness; he was too poor to buy an implement with which to cut it, and could borrow none until Saturday evening. He cut his grain on Sunday to save it. It was held that such work was not of necessity. Again, in the case of *State* v. *Knight,* 29 W. Va., 242, it was held that the killing of an animal, whose horns became broken, to save meat which it was feared would become fevered was not a work of necessity.

There are numerous cases which, while not exactly parallel, are offered to lend such light as they have to the question in issue. In the case of *McGrath* v. *Merwin,* 112 Mass., 267, it was held that the cleaning out of a wheel pit on Sunday, for the purpose of preventing the stoppage on a week day of mills which employed many hands is not a work of necessity or charity. The mere fact that loss follows the enforcement of the law against Sunday violation does not make the law inoperative as to that class of cases. If such were true then in nearly every instance it might be said that the enforcement of the statute works a loss, and the law would be practically nullified.

The work of a barber on Sunday is not a work of necessity, and has been so held in the case of *People* v. *Bellet,* 99 Mich., 151, *Ex parte Kennedy,* Texas Court of Criminal Appeals, 51

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Brief for appellant.

L. R. A., 270; and *State of Utah* v. *Henry Sopher,* 60 L. R. A., 468, and in many other cases too numerous to cite.

The selling of cigars on Sunday is not a work of necessity as held in *Mueller* v. *State,* 76 Ind., 310.

In the case of *Arnheiter* v. *State of Georgia,* 58 L. R. A., 392, it was held that the sale of meat by a butcher on Sunday was not a work of necessity or charity. This bears out our contention, that the mere fact that the goods are subject to decay does not place it within the exceptions contemplated by the law.

The business of trading, bartering, selling or buying goods, wares and merchandise is labor within the meaning of the law regulating the observance of Sunday, as held in the case of *Cincinnati* v. *Rice,* 15 Ohio, 225.

We have been unable to find any case where the question of the sale of fruit on Sunday is tested, probably because the results were so obvious, in that the violation of the law is so apparent, that it has not been questioned save in the present instance.

Alexander & Alexander, and *George B. Power,* on same side.

Whether viewed from a moral, religious or a practical point of view, time has demonstrated that one day out of seven should be set apart for worship or for rest—to allow those who are inclined to worship to do so without being disturbed by the distractions incident to days of business—to allow those who are inclined to rest to do so without disturbance on the part of others; the law compels no man to worship, but the law sets apart one day out of seven on which he can worship and compels others to observe that day, at least, to the extent of not interfering with the rights secured to those who worship; the laws says to a man that he may cease from his business one day out of seven either for worship or for rest and that his neighbors and competitors must cease from their business on the same day. Ordained by the Almighty, the Sunday Law

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has come down to us through the ages; is old as Time itself; is as reasonable to-day as it was when God rested from His labors.

The Sunday Law is on our statute books and the rights of those who would observe the Sabbath, demand that all others be compelled to observe it.

Section 1367 of the Code of 1906 provides that "a merchant, shopkeeper, or other person, shall not keep open store, or dispose of any wares or merchandise, goods or chattels on Sunday or sell or barter the same, etc."

(1) Was Stratakos a merchant? We think so clearly.

"Merchant is defined by Webster to be one who carries on trade or who traffics; who buys goods to sell again; any one who is engaged in the purchase and sale of goods; a trafficker, a trader." Words & Phrases, vol. 5, p. 4482.

"A merchant is a dealer in goods, wares and merchandise, who has the same on hand for present delivery." *Ib.*

"The term 'merchant' embraces all who buy and sell any species of movable goods for gain or profit." *Ib.*

"The term produce dealer applies to a person engaged in the business of buying and selling fruits, butter, eggs, poultry, and produce. Such a dealer is a merchant, within the meaning of the Kansas City charter, authorizing the council to license merchants." *Ib.*, p. 4487.

(2) If not a merchant, in the usual acceptation of that term, was he not a shopkeeper?

A shopkeeper differs from a merchant in that he is a small dealer. Words & Phrases, vol. 5, p. 4487.

"Webster defines the word 'shop' as follows: 'A building in which goods, wares, drugs, etc., are sold at retail, etc.'" *Ib.*

"Worcester defines a shop as a place, building or room in which things are sold; a store." *Ib.*

(3) Did Stratakos "keep open store" on Sunday? We think he did.

"The word 'store' is employed in § 585 of the Code to

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designate a place where goods are sold. Although goods are usually kept for sale in a house, it is not true that their being kept in a house is necessary to constitute a store. Therefore, the fact that the appellant did not keep his goods in a house is not decisive of his liability to a privilege tax." *Folkes* v. *State,* 63 Miss., 83.

"The purpose of the statute is to impose a tax on every place where goods are deposited and sold by a dealer engaged in buying and selling goods." *Ib.*

We can find no other provision of the Code for taxing a fruit stand than is contained in § 3872 of the Code of 1906, which imposes privilege taxes on "stores."

"The word 'store' means a place where goods are kept on deposit, especially in large quantities—a warehouse; and also, a place where goods are kept for sale in large or small quantities. . . . Until the legislature undertakes the work of classification of stores generally, we must hold the generic term used in the Code to embrace every species of store not otherwise particularly named and taxed. *Pitts* v. *Vicksburg,* 72 Miss., 181, s.c., 14 South., 418.

The term "fruit stand" must necessarily mean a place where fruit is sold, if it means anything at all.

(4) If not a merchant or a shopkeeper, was not Stratakos some "other person"? If not guilty of keeping "open store" was he not guilty of disposing of "wares or merchandise" or of "selling or bartering the same." We respectfully submit that, under the agreed statement of facts he was. We shall not even discuss whether or not fruits are "wares or merchandise, goods or chattels." It needs no discussion.

Clearly Stratakos was guilty of a violation of the "Sunday Law" as it is contained in sec. 1367, as he was neither an apothecary nor a druggist, the only exceptions made in that section.

Can he escape under any exception contained in sec. 1366? We do not see how he can.

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Brief for appellee.

He was not engaged in railroad, steamboat, telegraph, telephone or street railway work. The opening of his fruit stand and the selling of fruit did not require the discharge of any of "the ordinary household offices of necessity."

Certainly, it can not be urged that the opening and keeping open of his fruit stand and the selling of fruit was an "act of charity"—at least fruit dealers are not usually in business for "sweet charity's sake," and there is nothing in the record to show that Stratakos was any exception.

Nor can it be urged with any reason that there is any necessity for keeping open a fruit stand and selling fruit on Sunday. We take it that the word "necessity" means public necessity—the doing of such things as the public needs demand; the exceptions contained in the two sections unmistakably give it that meaning; one cannot anticipate illness from Saturday night to Sunday and provide himself with such drugs as he may need on Sunday; for a large part of the year in this state one could not keep either ice or meat over from Saturday to Sunday, unless he converted his refrigerator into a cold storage plant; there is some reason for allowing the specified and designated articles to be sold on Sunday. But, if fruit is needed for Sunday's menu, it could with all safety, and with no danger of spoiling, be purchased on Saturday.

Barrett & Taylor, for appellee.

The prosecution is under §§ 1366 and 1367 of the Code of 1906. These are the general laws regulating the Sabbath observance of the state, in which there are certain exceptions named, as follows: Except it be in the ordinary household offices of daily necessity or other work of necessity or charity —or labor on railroads or steamboats, telegraph or telephone lines, street railways or in the business of a livery stable, meat market or ice house." Our contention is that we come within the exceptions named in the statute, that is to say, that the sale of fruit on Sunday is a necessity.

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Brief for appellee.

In *Edgerton* v. *State,* 67 Ind., 538, a question of desecration of Sunday by criminal labor is held to be one of fact. In this case it was held that it was not unlawful in the fall before corn is ripe to haul corn to feed hogs in the field and to feed them on Sunday, it being ordinary practice of good husbandmen to gather the feed daily in the field. Now in the cases at bar, the question of fact was passed on as stated above. In that case the court said: "The evidence is so clearly insufficient that we cannot approve the verdict." In the case at bar the verdict was as above stated.

"A work of necessity within the meaning of the statute does not mean a physical or absolute necessity, but a moral fitness or propriety in the work done under the circumstances of each particular case may be deemed a necessity, within the meaning of the law." *Ib.* Then the question really is whether the selling of fruit on Sunday is a necessity, or work of necessity, and we contend that it is.

There is no express exception in the statute permitting milk or bread to be sold on Sunday, yet we know that milk and bread as food are necessities to the human race, and in these times the article of fruit has become to be used so generally as to become an article of food of daily necessity, and especially so in this hot climate; so the need of fruit, milk and bread is so closely connected with and so necessary to the ordinary household offices of daily necessity as for the sale thereof to fall within the statute, as much so as the sale of meat or ice.

Again, if the sale of meat or of ice is a matter of necessity, we do not see by what course of reasoning we could arrive at excluding the sale of milk, fruit and bread, so we contend that a liberal construction placed upon the statute that the sale of bread, milk and fruit and other articles of daily necessity are as clearly within the statute as if specifically excepted, as is the sale of meat and ice.

Again, the necessity for anything may grow out of or be incident to a particular trade or calling and yet be a work

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of necessity within the meaning of the statute, and so the sale of fruit in this instance is incident to the ordinary household offices of daily necessity and therefore excepted from the operation of the statute; it being always the policy of the law to give a liberal construction to criminal statutes in favor of the accused and to be a crime the thing done has to come both within the letter and the spirit of the law." *State* v. *Austin,* 23 So. Rep., 34.

Now in the coast country, we have large numbers of poor people, as well as rich, who come here to spend Sunday on account of cheap transportation, and the pleasures and benefits to be derived from a day spent here, as well as a great many other transient persons who have no way of keeping fruit should they purchase the same on Saturday for their necessity on Sunday, and so from this viewpoint the sale of fruit on Sunday is a matter of necessity for the people aforesaid.

Fruit is of a perishable nature and in this warm climate is very liable to spoil from Saturday night over to Monday morning. In *Crockett* v. *State.* 34 Ind., 416, the court held that it was not unlawful to turn malt in the process of making beer on Sunday, for the reason that the malt would spoil if it were not turned; and in *Manhattan Iron Works* v. *French,* 12 Abb. (N. C.), 448, the court held that it was not unlawful to operate a smelting furnace on Sunday, and in our state the statute expressly excepts ice houses.

The reason given in all these cases is, as we understand it, that it would result in the loss of their goods in the business or occupation, so, applying the same reasoning, if the fruit be not disposed of, it being a perishable product, loss would be inevitable to the fruit dealer and he must therefore sell his fruit on Sunday as a matter of necessity to his business, as much so as in the cases cited above.

Also, in support of the above, we cite *Wilkinson* v. *State,* 54 Ind., 416, which reads as follows: "Where a person had hauled to market on Sunday his dead ripe crop of watermelons,

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Brief for appellee.

which otherwise would have spoiled, it was held that this was a work of necessity within the meaning of a statute prohibiting labor on Sunday, except works of charity and necessity.

Again, the finding of the court in these cases that the evidence introduced, as shown in the agreed statement of facts, was not sufficient to constitute an offense against the ordinances is well supported in the case of *Arkansas* v. *Collett*, 64 L. R. A., 204, the court holding in that case that it was a question of fact as to whether or not what was done, namely, the repairing of a belt on Sunday, was a work of necessity, and they refused to disturb the verdict, though they were skeptical on the point of evidence, yet it was an agreed statement of facts, as in the cases at bar.

Counsel for the city cite the case of *State* v. *Goff*, 20 Ark., 289, to show that it was unlawful to cut grain that was wasting from overripeness on Sunday. Now, as is well known, the state of Indiana produces a great deal of grain and the books have numerous cases from that state for prosecutions of the violations of the Sunday Law, but in *Turner* v. *State*, 67 Ind., 595, the court says that the harvesting on Sunday of dead ripe wheat which could not be cut sooner and which might be spoiled by rain if left until a later day is not a desecration of the Sabbath.

In *Carver* v. *State*, 69 Ind., 62, keeping a hotel on Sunday in the same way it is usually kept on a week day is not unlawful. So we find that various jurisdictions place different interpretations upon the so-called Sunday Law, as to the implied exceptions in the statutes.

In answer to the appellant's brief wherein counsel speaks from a religious view of the matter, as well as following the Blue Laws, we beg to cite from the Book of Books in the language of our Blessed Lord, as written in Mark 2:27, "The Sabbath was made for man and not man for the Sabbath."

There is no proof to show that Stratakos had a store or that he kept a store open on Sunday. The furtherest the agreed

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statement of facts goes is that he kept his place of business open, naming it as a fruit stand, whereas the affidavits charge that he kept open a store and the affidavits and agreements clearly show that there is a difference between a store and a fruit stand, or else the proof would have been made as alleged in the affidavits, and the court found by its verdict that Stratakos did not keep open a store on Sunday under the evidence, and we do not see how appellant can in the face of its own agreement contend that he did.

MAYES, J., delivered the opinion of the court.

This prosecution was begun in March, 1907, under the Code of 1906. Section 40, par. 2, of the Code, gives a municipality the same right of appeal that is given to the state. The state, or a municipality, may appeal in any case from a judgment acquitting a defendant, where a question of law has been decided adversely to either. The record in this case presents a pure question of law, and nothing else. The agreed facts make a clear case of violation of § 1367 of the Code of 1906, if, as a matter of law, the keeper of a fruit stand is "a merchant, shopkeeper, or other person," within the meaning of § 1367 of the Code of 1906, prohibited from keeping open store, or disposing of any wares or merchandise, goods or chattels, on Sunday, or selling or bartering the same.

It is difficult for us to perceive how the terms of a statute could be broader, or more clearly embrace within its provisions the exact case presented than this one does. The agreed facts show that Stratakos was the owner of a fruit stand, that he kept open his place of business on Sunday, and sold fruit. The sale of fruit on Sunday is not a work of necessity or charity, and any person engaged in the business who keeps open store on Sunday, or disposes of, or sells, or barters, fruit on that day, is clearly guilty of a violation of § 1367 of the Code. The statute makes it an offense for any merchant, shopkeeper, or other person, whether that other person be a

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merchant or shopkeeper, to do any one of the following things on Sunday, viz.: Keep open store; dispose of any wares or merchandise, goods or chattels; or sell or barter any wares or merchandise, goods or chattels. In our judgment the keeper of a fruit stand is a shopkeeper, within the meaning of this statute, and the keeping open of his stand on Sunday is the keeping of an "open store" within the statute; but, whether this view be correct or not, the statute prohibits any person, whether merchant or shopkeeper, from disposing of any wares or merchandise, goods or chattels, or selling or bartering the same, on Sunday, and the vendor of fruit is clearly the vendor of wares or merchandise, goods or chattels. Fruit is merchandise, within the meaning of the statute under consideration. In the case of *Blackwood* v. *Cutting Packing Co.*, 76 Cal., 212, 18 Pac., 248, 9 Am. St. Rep., 199, in that part of the opinion to be found on page 214 of 76 Cal., page 249 of 18 Pac. and page 201 of 9 Am. St. Rep., it is said: "The plaintiff contends, in the first place, that apricots are not merchandise. A walk through the markets would probably convince him that he is mistaken. It is said, however, that such fruit comes under the head of 'produce.' Very likely it does. But we think that the word 'merchandise' covers all kinds of personal property which is ordinarily bought and sold." This language is used, it is true, in a civil suit; but the language of the statute under discussion in this case justifies the adoption of this definition as applied to it.

The case of *State* v. *Willingham*, 86 Miss., 203, 38 South., 334, has no application here. In that case an appeal was attempted to be taken by the state from the decision of the judge on a question of fact. The court properly held that this could not be done. In this case the question of law presented, the facts being agreed to and showing a violation of law, is whether or not a fruit vendor is a shopkeeper, or vendor of merchandise, within the meaning of the statute.

We think the learned circuit judge erred in his holding, discharging the defendant.

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Statement of the case.

JAMES W. BRUMFIELD v. ENOCH HOOVER.

[43 South., 951.]

1. REPLEVIN. *Jurisdiction. Amount in controversy. Value of property.*

In replevin, the value of the property seized, and not the amount of the debt for which the seizure is made, determines the amount in controversy as regards jurisdiction.

2. SAME. *Parties. Sales. Reservation of title.*

One who sells to his partner, with a reservation of title until payment, his undivided interest in partnership property previously sold by the firm with a like reservation of title, may, on default of the firm's vendee, whose purchase money notes are held by him as collateral security, maintain replevin for the property without making his partner a party. *Biddle* v. *Paine*, 74 Miss., 497, and *Journey* v. *Priestly*, 70 Miss., 586, distinguished.

FROM the circuit court of Lawrence county.

HON. ROBERT L. BULLARD, Judge.

Brumfield, the appellant, was plaintiff in the court below; and Hoover, the appellee, was defendant there. From a judgment in favor of defendant, the plaintiff appealed to the supreme court.

The plaintiff instituted replevin to secure possession of certain personal property in the defendant's possession. The opinion states the facts except that it should be noted that the notes of Hoover had been assigned to Brumfield as collateral security for Anthony's notes. At the close of the testimony for the plaintiff, the court sustained a motion of defendant to exclude the evidence and instruct the jury to return verdict in defendant's favor, on the ground that the court had no jurisdiction under the circumstances.

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Brief for appellant.

Hilton & Hilton, and *Chalmers Alexander,* for appellant.

Appellant sought, by replevin, to secure possession of personal property alleged in his affidavit to be worth over $200 in value; and the sheriff's return of the writ of replevin showed his official valuation of the property taken in custody by him to be above $200. The undisputed evidence showed the value of the personalty, consisting of several yokes of oxen, and a wagon to be worth over $200; and there is nothing to bring up any question of *mala fides* in appellant's estimate of valuation in his affidavit in replevin or in his testimony. But because it appeared that the appellant's right to possession, that is, his right to institute replevin proceedings, was based upon reservation of title in a promissory note executed by the appellee to W. S. Anthony Lumber Company or order, and, at the time of institution of suit, in the hands of appellant as collateral security, the note being only for $66.66, the lower court held that the circuit court had no jurisdiction.

It is difficult to see how the lower court came to such conclusion. True, the promissory note, containing the reservation of title of the property in issue, was for a sum less than $200, the limit of the circuit court's jurisdiction in suits on contract, debt, etc., but the affidavit in replevin distinctly stated that the property involved, to-wit, the four yokes of oxen and the eight-wheeled wagon, was worth $323. The suit was in replevin, not in assumpsit. Code 1892, § 3707, expressly states that the plaintiff in replevin shall state the value of the property in issue, and that a writ shall be issued to the proper officer "returnable, as a summons, before the proper circuit court when the value exceeds $200."

It would appear that the lower court constantly and erroneously kept in mind, during the trial, that the small promissory note for $66.66, executed by Hoover, and on which, because of the reservation of title therein, appellant claimed a right to the replevin proceeding, was introduced in evidence by appellant as an evidence of *debt,* and not as evidence merely

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of *title*. Counsel for appellant distinctly showed their sole purpose in introducing it. But the lower court, with the figures, "$66.66," in its mind, and its legal eye, figuratively speaking, on Code 1892, § 645, which declares that $200 shall be the limit of low water jurisdiction in a circuit court as to suits originally brought therein, seemed led astray by the case of *Biddle* v. *Paine,* 74 Miss., 497, s.c., 21 South., 250, and sustained the appellee's motion to exclude the evidence and award a judgment for appellee. Yet, in the case of *Biddle* v. *Paine,* WHITFIELD, C. J., distinctly called attention to the difference between that case, an attachment suit for rent, and the usual replevin suits instituted under ch. 114 of the Code of 1892, on "Replevin," his opinion stating that "as pointed out in *Maxey* v. *White* and *Towne* v. *Boarman,* this (a tenant's replevin) suit is unlike the ordinary action of replevin. There the value of the *property* is the test of jurisdiction; here (*i. e.,* in the tenant's replevin suit) the amount *distrained* for; there, not guilty, is the plea; here, it is *non cepit,*" etc. Had the learned circuit judge below carefully read *Ball* v. *Sledge,* 82 Miss., 749, s.c., 35 South., 214, he would have found a sledge-hammer decision on the very nail head in issue, to the effect that the *affidavit* determines the jurisdiction, as concerns the value of property sued for, unless the plaintiff knowingly undervalued or overvalued it for purpose of securing jurisdiction. See also *Fenn* v. *Harrington,* 54 Miss., 535; *Dederick* v. *Wolfe,* 68 Miss., 504, s.c., 9 South., 350; Tiffany on Sales, 549; B. & A. Digest, p. 1048.

Appellee, however, contends that the question of parties is here concerned, and that as appellant was merely a holder of the note as bailee, Anthony, the other partner of the Anthony Lumber Company, the payee of the note, should have been a party. It may be that Anthony might have brought the suit under the assignment; but Brumfield not only had the right, but it was, in fact, his duty to Anthony, to collect the money due from Hoover by this method. B. & A. Digest, p. 1048.

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Brief for appellee.

A pledgee must use diligence, and take necessary steps for protection of parties. *McLemore* v. *Hawkins,* 46 Miss., 715; *Jones* v. *Hicks,* 52 Miss., 682; *Selleck* v. *Compress Co.,* 72 Miss., 1019, s.c., 17 South., 603.

The case of *Journey* v. *Priestly,* 70 Miss., 586; s.c., 12 South., 199, a chancery suit, relied upon by opposing counsel, is not in point. In that case it was necessary to invoke chancery jurisdiction because Priestly had purchased an undivided interest in partnership property, and an accounting was necessary.

Livingston & Cowart, for appellee.

Code 1906, § 702 (Code 1892, § 645), states that "the circuit court shall have original jurisdiction in all cases when the principal of the amount in controversy exceeds $200." Now, did the amount of the principal here amount to that sum? We answer, with the record, that it did not, but that, on the contrary, it amounted only to $66.66; and evidenced by a promissory note which had been assigned as collateral security for payment of a series of notes of $189.65 each.

Code 1906, § 706 (Code 1892, § 649), provides that if a suit shall be brought in the circuit court for a sum less than the court can take cognizance of, or if a greater sum than is due shall be demanded, on purpose to confer jurisdiction, the plaintiff shall be nonsuited. The appellant admits in his testimony that he brought this suit when he well knew that at the very most only $189.65 of the primary debt was due, thus showing a wilful disregard of the rights of appellee.

Appellant, at the most, had only a limited interest in the property replevied, that interest being confined to $66.66. Code 1892, § 3726; Code 1906, § 4233.

The reservation of title to the property in question was only as security for an unpaid balance. In proceedings to subject the property, in a case such as this, due regard must be had to the equitable rights of the purchaser. *Foundry Co.* v. *Pas-*

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cagoula Ice Co., 72 Miss., 608, s.c., 18 South., 364. But here is a case at bar where the appellant not only failed to regard the equity of the purchaser, but also failed to regard the equity of W. S. Anthony, who, we submit, had an interest in the property.

Under the law of primary and secondary liability, ought not the appellant to have exhausted his remedy against Anthony, the maker of the $189.65 note payable to the appellant, Brumfield or bearer? Brumfield held the appellee's note for $66.66, payable to W. S. Anthony Lumber Company or order, solely as collateral security. And it was solely because of the reservation of title therein to the property that the appellant makes claim to the right to replevy.

We think that where the assignment of a note is not absolute the assignor should be made a party to the suit brought by the assignee to enforce the chose assigned. *Journey* v. *Priestly*, 70 Miss., 586, 12 South Rep., 799.

CALHOON, J., delivered the opinion of the court.

This is an action under the general statute of replevin, brought by Brumfield against Hoover. The value of the property seized by the sheriff under this writ of replevin was $323. The seizure, however, was based upon the nonpayment of a note of $66.66, which, if that were determinative, would be within the jurisdiction of a justice of the peace. The facts are not disputed, and are these: Brumfield and one Anthony had been partners, and while so partners sold the property in controversy to Hoover, and took from Hoover a series of notes for $66.66, payable to the partnership, or order, and in each note it is specified that the title and ownership of the property should remain in the partnership until the note was paid. Subsequently Anthony bought all the interest of Brumfield in the partnership property. For this interest Anthony gave a series of promissory notes for $189.65, each payable to Brumfield, or bearer, in which it is also specified that the title to an undi-

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vided half interest is retained by Brumfield until each and every dollar should be paid. It turned out that Hoover failed to pay one of his notes, and thereupon Brumfield instituted his action of replevin in the circuit court, under which the whole of the $323 worth of property in Hoover's possession was seized by the officer.

The circuit court had jurisdiction, it being determined by the value of the property seized. It was unnecessary in this action at law to make Anthony a party. It may be that Anthony might himself have brought the suit under the assignment; but Brumfield not only had the right, but it was his duty to Anthony, to realize the money due from Hoover by this sort of an action. See Brame & Alexander's Digest, on page 1048, paragraphs Nos. 18, 25, 27, 35. It will not do to confuse this case with that of *Biddle* v. *Paine,* 74 Miss., 497, 21 South., 250. The distinction between the general action of replevin and the particular one under the statute in reference to distress by landlords is plainly marked out by judge WHITFIELD, speaking for the court in that case. Neither will it do to confuse this case with that of *Journey* v. *Priestly,* 70 Miss., 586, 12 South., 799. In that case it was necessary to invoke the jurisdiction of equity, because Priestly had bought an undivided interest in partnership property, and that interest had to be ascertained by an action. But in that case Judge CAMPBELL, in the conclusion of his opinion, shows that, if the purchase had been of specific articles, the general action of replevin could have been sustained. The case before us is not to try title, but the right to possession.

Reversed and remanded.

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Statement of the case.

FARMERS' MUTUAL FIRE INSURANCE COMPANY OF MISSISSIPPI *v.* WILLIAM Q. COLE, INSURANCE COMMISSIONER.

[43 South., 949.]

1. INSURANCE. *Fire insurance. Corporations. Right to do business in state. Statutory provisions. Code* 1906, *ch.* 24. *Code* 1906, § 2564.

A mutual fire insurance company, having no capital stock, incorporated under ch. 24, Code 1906, and empowered to insure the property of its members only, cannot compel the issuance to it of a certificate of authority to carry on the insurance business generally, under Code 1906, § 2564, providing for the grant of such a certificate to qualified companies desiring to do a general insurance business in the state.

2. SAME. *Statutory right.*

The statutory right to transact business as an insurance company is the right to do a general business and not the restricted right of a mutual insurance company to insure its own members.

FROM the circuit court of, first district, Hinds county.

HON. ROBERT L. BULLARD, Judge.

The insurance company, appellant, was plaintiff in the court below; Cole, the appellee, was defendant there. From a judgment sustaining defendant's demurrer to plaintiff's petition and dismissing the suit plaintiff appealed to the supreme court.

The Farmers' Mutual Fire Insurance Company sued for a mandamus against Cole, insurance commissioner. The appellant company, chartered under ch. 24, Code 1896, made application to the insurance commissioner for a certificate of authority under Code 1906, § 2564, of approval under sec. 2580, and for a privilege license under sec. 2629. The insurance commissioner declined to issue any of the documents, and the insurance company sued.

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Brief for appellant.

Henry, Barbour & Henry, for appellant.

The history of insurance legislation in Mississippi, as applicable to this case, since and including the Code of 1892, as to mutual companies is brief, as follows: There is no provision whatever under the Code of 1892 either in the chapter on "Insurance" or in the chapter on "Corporations" for the organization of mutual companies, nor for their admission to do business in the state of Mississippi. Under the Code of 1892, § 2332, no insurance company incorporated in any other state can transact business in this state, unless it possesses at least $150,000 of actual capital.

By ch. 73, p. 90, acts of the Mississippi legislature of 1898, provision was made for the organization under the general law on corporations, of mutual insurance associations for the purpose of insuring the property of their own members only.

Section 98, ch. 59, acts of the Mississippi legislature, 1902, attempted to repeal all laws relative to domestic fire insurance companies, which is probably nugatory under sec. 61 of the constitution of Mississippi, which provides that "no law shall be amended or revived by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length," but this is immaterial to the discussion now before the court. The purpose of the legislature, by ch. 59, acts of 1902, was undoubtedly to repeal all laws with reference to the formation of domestic mutual fire insurance companies.

But the Code of 1906, by § 897, specifically authorizes the organization of mutual fire insurance companies, and sec. 2578 says the like, thus showing a change of legislative mind after the act of 1902. Further, § 2606 of the Code of 1906 admits mutual foreign companies to do business in the state, as did also sec. 44 (see paragraph, p. 80) of the acts of 1902, a great departure from the Code of 1892.

Section 2559, Code of 1906, gives to the commissioner of insurance the power of inspection and supervision over all insurance companies.

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Brief for appellant.

Section 2564 authorizes the insurance commissioner to grant a certificate of authority to any insurance company to do business, he to be satisfied by examination that it is qualified under the laws of the state to transact business, and as to financial ability and condition.

Section 2571 of the Code of 1906 says: "The general provisions of law relative to the powers, duties and liabilities of corporations shall apply to all incorporated domestic insurance companies, etc."

Section 2572 provides that domestic insurance companies incorporated by special acts, whose charters are subject to limitation of time, shall, after such limitation expires, continue to be bodies corporate, subject to all general laws applicable to such companies.

Section 2629 directs the insurance commissioner to collect and pay into the state treasury the sum of $200 for each fire insurance company.

Section 2652 denies access to the courts to any fire insurance company that has not been authorized by the commissioner to transact such insurance business.

It will be noticed that the petition of mandamus states that the commissioner of insurance refused to comply with the requests set forth in said petition on the ground that mutual fire insurance companies are not authorized to do business in Mississippi. This effectually meets the grounds of the demurrer as to the acts being within the discretion of the commissioner, and that therefore he is not subject to mandamus. But even if this were not set forth in the petition the honorable commissioner could not avail of the plea that it is discretionary with him—a judicial discretion, if you please, to admit or not to admit a domestic insurance company to do business in Mississippi. When any domestic insurance company organizes under the laws of the state of Mississippi, and complies fully with those laws, and knocks at the door of the insurance commissioner for admission, and demonstrates its compliance with the

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Brief for appellee.

law, he has no discretion in the premises. He must bid them enter. Otherwise he is superior to the laws of the state; superior to the law which created him.

The appellant was organized under the laws of Mississippi as hereinbefore set out, and the law observed in every particular, and the commissioner advised thereof, as the petition sets forth, and all this admitted by the demurrer to be true, yet it is said the commissioner has discretion that mandamus cannot interfere with or override—that the law is powerless against his judgment; that though the law is that mutual companies may be organized to insure the property of its members only, the insurance commissioner may say they cannot do business. It is no answer that he has nothing to do with mutual companies; that they are independent of him. He certainly has inspection and supervision over them under § 2559, Code 1906, and § 2652, Code 1906, denies access to the courts to any insurance company not authorized by the insurance commissioner to transact insurance business, which risk appellant does not care to assume, nor does it wish to subject its agents to the penalties of § 2658, Code 1906.

The circuit court should have ordered the writ of mandamus commanding the commissioner of insurance to issue the appellant a certificate authorizing it to do business in accordance with the powers conferred by its charter.

R. V. Fletcher, attorney-general, for appellee.

This litigation is an effort on the part of this association to secure an authoritative ruling as to the status and attitude of mutual fire insurance companies organized not under the insurance chapter, but under the general chapter on corporations. So far as the insurance chapter is concerned, in secs. 2576 *et seq.,* there is a fully developed and elaborate scheme by which domestic insurance companies may be organized. This plan, however, is entirely separate and distinct from companies organized under the chapter on corporations. The only insur-

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Brief for appellee.

ance companies which may be organized under the insurance chapter, other than fraternal orders doing a life insurance business, are companies organized on the stock plan. It is distinctly stated in the first paragraph of sec. 2576 that insurance companies may be formed as provided in sec. 2578 on the stock plan to insure against loss by fire, etc. Nowhere in the chapter is there any provision for the organization of mutual fire insurance companies. Indeed, no mutual fire insurance company, even though a foreign corporation, may be admitted to do business in this state; and foreign mutual life insurance companies may be admitted into the state only when they furnish satisfactory proof to the insurance commissioner that its net cash assets are equal to the capital required of like companies on the stock plan. Section 2606, par. 2.

It would therefore seem to be clear that the legislature intended to bar from the state entirely all fire insurance associations except those organized on the stock plan. It is exceedingly difficult to reconcile this view with the statement found in sec. 897, and yet no provision is made in the insurance chapter for the regulation, licensing, or control of any mutual fire insurance company. But, however this may be, it is difficult to see how the court can grant the relief prayed for in the petition. If it was the intention of the legislature to exempt fire insurance companies from the supervisory power of the insurance commissioner, then such commissioner would have nothing to do with granting any certificate of authority or passing upon the organization of the company, and would be limited entirely to the collection of the privilege tax. If, on the other hand, such companies are subject to the control and jurisdiction of the insurance department still this suit cannot be maintained. It would seem that this court is committed to the doctrine that all insurance corporations, associations, partnerships, or individuals, are subject to the jurisdiction of the department. *Fikes* v. *State*, 87 Miss., 251.

We come now to the three things which petitioner asks the

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court to compel the insurance commissioner to do: In the first place, the court is asked to compel the commissioner to issue certificate of authority, under sec. 2564. There are two answers to this prayer of the petition: In the first place, the certificate of authority mentioned in sec. 2564 means the same thing as a privilege license. It is but a certificate attached to the privilege license, stating that the company is authorized to do business in the state. If it can be shown that the company is not subject to the privilege license, or is not entitled to a privilege license, then such certificate of authority cannot issue independent of the privilege license. It must be remembered that no agent of this company has applied to this insurance commissioner for a license, and, therefore sec. 2609 is not involved. The learned counsel for appellant, in his argument in the court below, admitted that this section referred to certificate of authority had no application to domestic insurance companies, but was limited in its application to foreign insurance companies.

But, if mistaken in this, it is in the next place contended that such certificate of authority may be withheld by the insurance commission in the exercise of his discretion, and that his discretion in the matter cannot be controlled by mandamus. It is a familiar learning of the profession that whenever the determination of a question is committed to an officer, he may be compelled by mandamus to act, perhaps, but such action cannot be controlled by the courts. In the instant case the petition itself shows that the commissioner has acted by refusing to issue the authority. High's Extraordinary Legal Remedies (2d ed.), sec. 24; *Insurance Co.* v. *Wilder,* 40 Kan., 561.

Argued orally by *R. V. Fletcher,* for appellee.

MAYES, J., delivered the opinion of the court.

This corporation, as the charter shows, is a mutual fire insurance company, without capital stock, incorporated under ch.

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24 of the Code of 1906, and empowered by its charter to insure the property of its members only. It cannot be contended that the Farmers' Mutual Fire Insurance Company was organized and chartered under any of the provisions of ch. 69 of the Code of 1906, which deals with the subject of insurance. Section 897, ch. 24, of the Code of 1906, provides that "corporations for every lawful purpose and of every kind, except for the construction and operation of a railroad other than street railroads, and the carrying on of an insurance business, may be created under the provisions of this chapter: provided, that the exception as to insurance companies shall not apply to mutual insurance associations organized for the purpose of insuring the property of its members only; and such associations may be incorporated under the provisions of this chapter." This section shows two things: First, that no insurance association, other than mutual insurance associations organized for the purpose of insuring the property of its members only, can be created under this chapter; and, second, that mutual insurance associations, organized for the purpose of insuring the property of its members only, must be incorporated under the provisions of this chapter. Section 2559 of the Code of 1906, in the chapter on "Insurance," expressly names all concerns subject to the department, and they are "all indemnity or guarantee companies, all companies, corporations, partnerships, associations, individual and fraternal orders, whether domestic or foreign, transacting or to be admitted to transact, the business of insurance in this state, are insurance companies within the meaning of this chapter, and shall be subject to the inspection and supervision of the commissioner." By § 2582 of the Code of 1906 it is provided that corporations created for the purpose of transacting fire insurance shall have a capital stock of not less than $50,000. This company cannot be liecnsed to do business in this state, as provided for other insurance companies in the chapter on "Insurance," because, first, it is not a kind of insurance company authorized to be created by the

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chapter on "Insurance"; second, it has no authority to transact business within this state, save with its own membership; third, it does not belong to that class of insurance companies subject to the department of insurance, as outlined in § 2559 of the Code of 1906; fourth, it has no capital stock, and cannot be authorized to transact the business of insurance in this state, unless it has a capital stock of not less than $50,000. It may insure its own members, but it does not get this power under the general insurance laws of the state, but by virtue of § 897 of the Code of 1906, under the chapter on "Corporations." Section 2564 of the Code of 1906 provides that "before granting a certificate of authority to any insurance company the commissioner shall be satisfied by examination that it is qualified under the laws of the state to transact business therein, and as to its financial ability and condition."

Clearly this record shows that this company is not qualified to transact business in the state, within the meaning of this statute, when the only right that is given it under the law is to deal with its own membership. It is not organized under the chapter on "Insurance." It has no capital stock. It is not subject to the department, and possesses none of the essentials required by the statute as a condition precedent to its right to transact the business of insurance in the state. When the statute speaks of the right to transact the business of insurance in this state, it means the right to do a general business, and has no reference to the restricted right that a mutual insurance company has to insure the property of its own membership. We decide no other question in the case.

Affirmed.

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Statement of the case.

MARTHA WELLS v. STATE OF MISSISSIPPI.

[43 South., 610.]

CRIMINAL LAW AND PROCEDURE. *Receiving stolen property. Indictment. Description of goods.*

It is essential in an indictment for receiving stolen property to describe the property with the same particularity as is required in an indictment for larceny.

FROM the circuit court of Lauderdale county.

HON. ROBERT F. COCHRAN, Judge.

Mrs. Wells, the appellant, was indicted and tried on a charge of receiving stolen property, was convicted, fined $100 and sentenced to the county jail for ninety days. From the conviction and sentence she appealed to the supreme court.

The indictment, after its formal parts, charged that appellant "did unlawfully and feloniously obtain goods, the personal property of J. M. Smith and J. A. Pigford, of the value of about $30, before then feloniously stolen, taken and carried away; the said Martha Wells well knowing the said goods and chattels to have been stolen, taken and carried away; and the said Martha Wells did then and there feloniously have, take and conceal said goods; contrary to the form of the statute in such cases made and provided," etc.

The appellant demurred to the indictment on the grounds that it was too vague and indefinite, there being no description of the property which she was charged to have received. The court below overruled the demurrer. There was a trial and jury verdict against appellant, the value of the property being by the jury found to be $17.50, less than the amount necessary to constitute grand larceny, had the indictment been for stealing.

Code 1906, § 1259 (Code 1892, § 1181) is as follows: "If

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a person buy or receive in any manner or on any consideration personal property of any value, feloniously taken away from another, knowing the same to have been so taken, he shall be guilty of receiving stolen goods, and on conviction, shall be punished by imprisonment in the penitentiary not more than five years, or by imprisonment in the county jail not more than six months, and by fine, not more than two hundred dollars."

F. V. Brahan, for appellant.

The appellant's demurrer to the indictment should have been sustained. The indictment was not good, under Code 1906, § 1259. It did not describe the property, nor specify the value of the same, nor from whom appellant received it. Nor does it properly charge any offense under the statute.

George Butler, assistant attorney-general, for appellee.

It cannot be denied that the facts showed that appellant was guilty of receiving stolen property.

It must be admitted, however, that the action of the court in overruling the appellant's demurrer to the indictment is questionable. Whether such action was prejudicial to appellant is respectfully submitted to the court without discussion.

WHITFIELD, C. J., delivered the opinion of the court.

The demurrer to the indictment should have been sustained. It is essential, in an indictment for receiving stolen property, to describe the property with the same particularity as is required in an indictment for larceny. See 2 Bishop, New Crim. Proc., secs. 982, 983; *Ib.* sec. 699 *et seq.*

The judgment is reversed, the demurrer to the indictment sustained, the indictment quashed, and the prisoner will be held to await a proper indictment.

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Statement of the case.

EX PARTE CLAUDE NEIL.

[43 South. Rep., 615.]

JURISDICTION. *Circuit Court. Special Term. Order. Entry on minutes. Code* 1906, § 988.

The failure of the clerk to enter on the minutes of a circuit court an order for a special term thereof, which was duly made and published, does not affect the validity of proceedings had at such term, though Code 1906, § 988, provides that such order shall be entered on the minutes as well as be made and published.

FROM the chancery court of, second district, Jones county.

HON. JAMES L. MCCASKILL, Chancellor.

Neil, the appellant, applied to the chancellor for a writ of *habeas corpus;* the writ was, on the hearing, denied, and the relator remanded to custody; from which judgment he appealed to the supreme court.

Appellant was indicted, tried and convicted of a misdemeanor at a special term of the circuit court of, second district, Jones county held on the third Monday of March, 1907, and sentenced to pay a fine of $300 and to be imprisoned as a county convict for ninety days on the county farm. Having been placed in custody under such judgment, appellant sued out a writ of *habeas corpus* on the ground that he was illegally deprived of his liberty in that the court in which he was convicted was not a legal tribunal, since there was no entry apparent upon the minutes of the circuit court showing any order of the judge of the court calling a special term of court to convene on the third Monday of March, 1907.

The application of appellant for *habeas corpus* was heard before the chancellor on an agreed statement of facts, which showed that the organization and conduct of the court were in all things regular and in conformity with law, but that the

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Brief for appellant.

order of the court calling the special term, though duly made and published as required by the statute, Code 1906, § 988, was not entered upon the minutes. The court denied the relator's application; hence this appeal.

C. R. Gavin, Stone Deavours, and *R. E. Halsell,* for appellant.

The question for decision before this court is, whether a proceeding had at a special term of court is valid, when the authority for holding the special term does not appear of record upon the minutes of the court.

By the legislative act of 1906, ch. 169, sec. 1, it is provided that the regular term of the circuit court of the second judicial district of Jones county shall be held in the city of Laurel on the first Monday of May and of November. It is therefore evident that the appellant, the relator below, was not indicted, tried and sentenced by a court held at the regular time fixed by law for holding a term. Hence the appellant is not now held by virtue of any proceeding had at a regular term of court, but is, instead, in custody by virtue of a proceeding had at an alleged special term of the circuit court held in Laurel.

Code 1906, § 988, regulates the holding of special terms of court, and, in substance, recites that "when the business of a circuit or chancery court may require, the judge or chancellor, in term time or vacation, may order a special term to be held, *and the order shall be entered on the minutes; or, if made in vacation, on the minutes of the special term.*"

We contend that the order calling a special term must appear upon the minutes or the proceedings at that term will be void. 11 Cyc., 730; *Grant* v. *State,* 62 Ala., 233; 21 Ency. Pl. & Pr., 620; *Daughdrill* v. *State,* 113 Ala., 7; *Dixon* v. *State,* 29 Ark., 165; *Spring* v. *Kane,* 86 Ill., 580; *Huber* v. *Armstrong,* 7 Bush. (Ky.), 590; *Harmon* v. *Copenhaven,* 89 Va., 836; *State* v. *Stanley,* 38 W. Va., 517.

The statute for the calling of special terms of the circuit

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Brief for appellee.

court in Mississippi, is mandatory and must be strictly construed. In support of this proposition we quote from Sutherland on Construction of Statutes: "Mandatory statutes are imperative. They must be strictly pursued, otherwise the proceeding which is taken ostensibly by virtue thereof will be void. Compliance substantially therewith is a condition precedent, that is, the validity of acts done under mandatory statutes depends on a compliance with its requirements. When a statute is passed authorizing a proceeding the mode of which an act shall be done, the mode pointed out must be strictly pursued." This proposition laid down by Sutherland is borne out by the following authorities: *Dolton* v. *Murphey,* 30 Miss., 59; *Coffman* v. *Daveny,* 2 Haward, 854, Miss.; *Koch* v. *Bridges,* 45 Miss., 247; *Shelly* v. *Bacon,* 10 Howard (U. S.), 56.

The court's attention is especially called to the case of *Koch* v. *Bridges, supra,* which, we contend, settles the question in this case; as the only hope for the appellee is that the clause requiring the order to be entered on the minutes be construed to be directory and not mandatory. In construing a similar statute the court said, in the case cited, on page 255 that, "this mode of getting rid of a statutory provision by calling it directory is not only unsatisfactory on account of the vagueness of the rule itself, but it is the exercise of a dispensing power by the courts, which approaches so near legislative discretion that it ought to be resorted to with reluctance."

R. V. Fletcher, assistant attorney-general, for appellee.

There is nothing inherent in the nature of a special term of court which requires the order, calling such special term, to be spread upon the minutes. Were the statute silent as to this requirement, it would hardly be contended that all the acts of the court were illegal merely because the order was not upon the minutes. *Friar* v. *State,* 3 How. (Miss.), 422.

The whole argument of appellant depends upon the recital

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Brief for appellee.

in the statute, Code 1906, § 988, that the order shall be spread upon the minutes. Yet, at the time the case of *Friar* v. *State*, *supra*, was decided, the provision requiring notice was just as emphatic and mandatory as is now the provision in the Code of 1906 requiring entry of the order upon the minutes. In the case cited it was expressly held that the notice of the time of holding the special term is not necessary to confer jurisdiction, and that such a provision is merely directory. See also *Mastronada* v. *State*, 60 Miss., 86.

It is contrary to our whole theory of law to hold that, where a court has been properly called, and parties have without objection submitted themselves to the court's jurisdiction, all of the acts of the court shall be considered void, and void merely because of a clerical omission. Certainly it would have been permissible at any time during the term to supply such omission by an order *nunc pro tunc*. Indeed, a *nunc pro tunc* order can be entered to correct a clerical omission even after the adjournment of the term. *Graves* v. *Fulton*, 7 How. (Miss.), 592; *Stokes* v. *Shannon*, 55 Miss., 583.

The modern law on this subject has been thus stated: "Accordingly the rule now very generally obtains that a court may amend its record with respect to clerical errors and misprisions as well after the term as during it." 17 Ency. Pl. & Pr., 920. See also *Burnett* v. *State*, 14 Tex., 455; *Miller* v. *Richardson*, 38 Tex., 500; *Bank* v. *Dudley*, 2 Pet. (U. S.), 492.

It being established that an omission such as is presented by this record can be supplied by a *nunc pro tunc* order which would of course relate back to the time when it should have been ordered, it is clear that this appeal from the *habeas corpus* proceeding would not lie, had the court seen proper to exercise its undoubted prerogative to amend its minutes. An order, the omission of which could be thus supplied at any time, cannot be said to be of such importance as to affect the jurisdiction of the court. In the case here on appeal, there is shown to have been a court below which was duly called, presided

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over by a qualified judge, to which relator submitted himself without making complaint as to jurisdiction; and, accordingly, if there can be such a thing as a *de facto* court, this presents a case of that kind. And that there may be a *de facto* court would appear from the case of *Brewer* v. *State,* 74 Tenn., 198, where it is said that, "when a circuit judge adjourns his court to a day beyond the commencement of the same circuit court, the court, if held, is a court *de facto,* and its proceedings valid in criminal as well as in civil cases."

It is hardly necessary to say what is self-evident, that the only purpose of requiring this order to be entered on the minutes is that there may remain as a permanent record some authority for holding the court. In other words, the minute entry is not the order of the judge, but simply the evidence of the order. A circuit court is a court of general jurisdiction, and it is not necessary for the jurisdictional facts to be entered at large upon the minutes of the court, as is the case with a court of inferior and limited jurisdiction. *Ames* v. *Williams,* 72 Miss., 760, s.c., 17 South., 762; *Williams* v. *Cammack,* 27 Misc., 209; *Gillespie* v. *Hauenstein,* 72 Miss., 838; s.c., 17 South., 602.

Argued orally by *E. R. Gavin,* for appellant and by *R. V. Fletcher,* attorney-general, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

The sole question of this case is this: Where a special term of the circuit court has been properly called, the proper notice of the time and place for holding the court has been given, and the order calling the special term has actually been made and actually filed with the circuit court, was the circuit court absolutely without jurisdiction to proceed at all, at said special term, merely because of the clerical omission on the part of the circuit clerk to enter the order on the minutes of the court? Manifestly not. In this case, out of which this *habeas corpus* grows, there clearly was jurisdiction to try the case so far as

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subject-matter was concerned, there was jurisdiction as to the parties (the state and the defendant), and the jurisdiction was exercisable and was exercised at the time and place fixed in the order calling the special term, the order was made and was filed, and the only difficulty grows out of the simple fact that the clerk failed to enter the order on the minutes of the court. When every element of jurisdiction, as to subject-matter, parties, time, and place, is present, it is inconceivable how the jurisdiction of the court, in any proper legal definition of the term "jurisdiction," can be seriously questioned. If one convicted of murder and sentenced to be hanged prosecutes a direct appeal to this court, and asks a reversal because the minutes of the court failed to show that the court was organized at all, the law provides that the case shall not be reversed because of the omission of so important a thing as the declaration that the court was organized. Section 4936, Code 1906. Surely, if jurisdiction is not defeated by failure to show on the minutes that the court was organized at all, it cannot be defeated by the mere clerical failure to enter the order calling the special term on the minutes of the court. Notice as to when and where the court will be held is far more important to litigants than the entry on the minutes of the order calling a special term, and yet the statute expressly provides now (what this court held was the law before the statute) that the failure to give such notice did not oust jurisdiction. See *Williams* v. *Cammack,* 27 Miss., 209, 61 Am. Dec. 508; *State* v. *Claude,* 35 La. Ann., 71, and *Mastronada* v. *State,* 60 Miss., 86. We do not think there is any merit in the contention of appellant.

The judgment of the court below is *affirmed.*

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Syllabus.

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CHARLES S. KENNEDY ET AL v. WILLIAM S. SANDERS ET AL.

[43 South., 913.]

1. TAX-TITLES. *Sales. Time Abatement Act. Laws* 1875, p. 49.

A sale made on May 10, 1875, for the taxes of the year 1874 cannot be a sale under the Abatement Act (Laws 1875, p. 49) and is void, the law requiring sales for the taxes of the year 1874 to be made in February, 1875.

2. SAME. *Appeals. Theory of defense Inconsistency.*

When defendants in a suit to quiet title claimed on the trial under a tax sale made on May 10, 1875, for the taxes of 1874, they can not on appeal claim title under the Abatement Act.

3. SAME. *Abatement sales. Land sales, etc. Evidence.*

A tax sale to the state under the Abatement Act can not be maintained without independent evidence that by reason of its delinquency for taxes of years prior to 1874 the land belonged to the class contemplated by the act, the mere production of the sales list to the state and the state's deed to the claimant being insufficient.

4. SAME. *Delinquency. Evidence. Assessment roll.*

An assessment of land to the state shown by a roll filed August 5, 1875, is imputable to a sale to the state that occurred on May 5, 1875, and not to a sale in 1874 for the taxes of 1873, or to some earlier sale.

5. SAME. *Limitations. Inapplicability.* Code 1871, § 1709; Code 1880, § 539.

A tax-collector being without power to sell under the Abatement Act land not delinquent for taxes that accrued prior to the year 1874, his sale of such land is void, and none of the statutes of limitations designed specially to protect tax titles are applicable to a claim under such sale.

6. SAME. *Adverse possession. Evidence. Assessment.*

The assessment of lands to defendants does not prove that they paid the taxes thereon, and is valueless as evidence of adverse possession.

7. SAME. *Title. Removal of clouds. Limitations.* Code 1892, § 2731.

A proceeding in equity by the holder of a valid paper title to land

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Brief for appellant.

to remove a cloud thereon asserted by one not in possession is not barred by his failure to sue within the period he might have made an entry or sued at law to recover the land under Code 1892, § 2731, providing that suits in equity to recover land may not be brought but within the period during which by virtue of § 2730 of said code he might have made an entry or brought an action to recover the land, if he had been entitled at law. *Jones* v. *Rogers*, 85 Miss., 802, overruled.

FROM the chancery court of Leflore county.

HON. PERCY BELL, Chancellor.

Sanders and others, appellees, were the complainants in the court below, and Kennedy and others, appellants, were defendants there. From a decree in favor of complainants the defendants appealed to the supreme court.

The complainants, claiming the ownership of certain real estate, filed their bill in chancery against the defendants to cancel, as a cloud upon their title, the claims of the defendants thereto, and for a confirmation of the title of complainants. Proper deraignment of title from the United States Government through successive grantees down to complainants was duly shown. The defendants' answer asserted claim to the realty by virtue of a sale made to the state of Mississippi on May 10 and 11, 1875, for the taxes of 1874, fortified by the following statutes of limitation: The three-year limitation in favor of tax titles contained in § 1709, Code 1871, and §§ 2730 and 2731 of Code 1892, being the ten-year limitation against suits to recover land at law and in equity respectively.

A decree was rendered in favor of complainants, and a commissioner appointed to take an account.

The opinion of the court states the facts.

McWillie & Thompson, for appellant.

The defendant claimed under a sale to the state for taxes which occurred on May 10, 1875, the time fixed by law for sales under the Abatement Act (Laws 1875, p. 14). All lands sold for taxes under the Abatement Act were sold for the

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taxes of 1874 alone, since the act was in reality an act to abate all taxes that had accrued prior to the year 1874 (Laws, p. 71), although no lands were subject to sale for taxes under the act which were not delinquent for taxes that accrued prior to 1874. Payment of the taxes of 1874, at any time before May 10th, would, under the act, have relieved the land of all claim for unpaid taxes (Laws 1875, p. 13). The regular time for tax sales was the first Monday in February, 1875, and that day had passed before the enactment of the Abatement Act which was the only authority for the sale on May 10, 1875.

It is not questioned that no lands were salable under the Abatement Act which were not delinquent for taxes which accrued prior to 1874, but it would appear from the assessment roll of 1875 shown in evidence that the lands must have been claimed by the state for the taxes of some year prior to 1874. Under § 1674, Code 1871, all assessments were predicated of ownership on the 1st day of January, and the ownership of the state of the land in question on that date could not have resulted from any tax sale later than that of 1874, which must have been made for the taxes of 1873, for, as above stated, tax sales, other than Abatement Act sales, occurred on the first Monday of February. *Gamble* v. *Witty,* 55 Miss., 33.

We are aware of the decision apparently holding that assessment to the state prior to 1874 is not evidence that land was held or claimed by the state and that the only sufficient evidence of that fact is a tax collector's deed or sales list, but we do not believe that the conclusion will bear examination. *Dingey* v. *Paxton,* 60 Miss., 1038.

The announcement of the doctrine was wholly unnecessary in the case cited for the reasons that it was affirmatively shown that the taxes prior to 1874 had been paid, and the assessment was void because of the imperfect description of the property. But the interpretation given to the Abatement Act cannot stand the test of reason. The act did not provide

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alone for the sale of lands held or owned by the state, but such also as were claimed by the state, *and it was necessary that there should be some one who should say what lands were claimed by the state in order that the act might become effective. This duty was devolved by the act on the tax collectors of the several counties, sec. 9 of which provided that they should immediately make out full, complete and proper lists of all such lands and taxes on same fully charged up, etc., and proceed to collect the taxes or sell the lands for nonpayment of the same.* Laws 1875, p. 14. An indulgence of the presumption that the tax collector discharged the duty imposed upon him by the terms of positive law cannot be complained of by any one interested, for it is open for him to show that the tax collector erred and the land was not of the character salable under the Abatement Act. In the absence of any showing to the contrary validity should be imputed to the precedent steps taken to subject the land in the one case as well as in the other. The question is not one of substantive right, but of evidence or practice. It may be shown that the tax collector erred and sold the land not claimed by the state, but his act in listing land as so claimed, made in obedience to law, should be given full faith and credit until something is shown to impeach its propriety.

Apart from the duties imposed upon the auditor of public accounts in respect to the ascertainment on final settlement of the taxes for which the land was sold contained in sec. 7 of the act, we find that by sec. 13 thereof the chancery clerks were required *to make a careful examination of the sales lists filed with them by the tax collectors as to proper and perfect descriptions of lands sold under the act and the taxes on same, belonging to the state, etc., and thereupon* to record the list and forward the original to the auditor whose deed itself imports that he, the custodian of all records showing the status of the lands as to previous sales, regarded it as properly sold under the act in question. Laws 1875, pp. 13, 16.

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Brief for appellant.

It is impossible to believe that it was contemplated by the lawmakers that a purchaser under this act should have the burden of showing that the acts of the collector, clerk and auditor were not all erroneous. Any other view but poorly consists with the idea that the sales under the act did not pass merely such title as the state had but conferred a new title deriving its efficacy from proceedings under the act, and other broad views that have been expressed as to the scope of the act. *Cochran* v. *Baker,* 60 Miss., 282.

The case of *Dingey* v. *Paxton* does not conflict with this view when properly considered. In that case plaintiff's ancestor, the original owner of the land, died in possession of it in 1873, and plaintiff produced tax receipt showing payment of the taxes of 1872 and 1873, and the assessment roll of 1873 introduced by defendant showed a void description and an unexplained erasure of the words "unknown owner" and the insertion of the word "state" in lieu thereof, besides being in conflict with the receipt for the taxes of 1872. Here the land was wild and no one had ever been in possession of it, an assessment roll was introduced which did show that the land was delinquent for taxes accrued prior to 1874 and no tax receipt or other evidence was introduced to contradict such showing.

Moreover, the limitation relied on in *Dingey* v. *Paxton,* a case where it was affirmatively shown that the tax claimant was without title, was not the three-year limitation of the Code of 1871, but the one year limitation arising under the act of 1876, which by its terms provided a short period of redemption and made the title of the state after that time absolutely unassailable as to all lands remaining unredeemed.

The cases cited to sustain the position taken in *Dingey* v. *Paxton* have no relevancy to the point decided. They are *Vaughan* v. *Swazie,* 56 Miss., 704; *Weathersby* v. *Thomas,* 57 Miss., 296, and *French* v. *Ladd,* 57 Miss., 678, which simply decided that a deed from the state for forfeited tax land must

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Brief for appellant.

be supported by the sales list of the tax collector. They did not hold that it was incumbent on the tax purchaser to make any showing as to matters preceding the sale.

The question of whether or not there had been a sale to the state does not appear from several decisions to be alone decisive of whether or not the land was subject to sale under the Abatement Act. In *Prophet* v. *Lundy,* 63 Miss., 606, 607 and *Chamberlain* v. *Lawrence County,* 71 Miss., 958, the decisive question is said to be whether or not the land was *delinquent* for taxes that accrued prior to 1874, and it certainly could be delinquent for such taxes without having been sued for them. This fact of delinquency was to be ascertained in the manner provided for by the act and the conclusions of the officers charged with that duty imports verity in the absence of any showing to the contrary.

The argument that the three-year limitation of § 1709, Code 1871, is inapplicable finds no support in the idea that the land in controversy is to be treated as land that was not subject to *taxation,* and the case of *Hoskins* v. *Railroad Co.,* 78 Miss., cited by appellee, is without pertinency, the land being subject to taxation whether it was subject to sale under the Abatement Act, or not.

The decision in the case cited related to land which by reason of its character was not subject to taxation at all. As to the land there involved the owner was released from any obligation whatever to inform himself of any tax proceeding affecting it and in respect to any such proceeding no presumption of regularity could be indulged. Such land was entirely outside the scheme of our revenue law and was affected by none of its regulations. Its character as land not subject to sale for taxes in no wise depended upon anything the owner might have done in respect to paying the taxes on anything the revenue authorities might have done or omitted to do in subjecting it for nonpayment.

This court has applied the three year limitation of the

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Code of 1880 (§ 539) in favor of the purchaser of land sold under the Abatement Act, although the land was sold on the wrong day and was not land that was legally salable under that act because no taxes for years prior to 1874 were due on it. *Brougher* v. *Stone,* 72 Miss., 647. There is no reason why the similar limitation of the Code of 1871 should not be applied. *Berry* v. *Gibson,* 66 Miss., 515. The course of decision in this court may be stated as follows:—In *Chambers* v. *Myrick,* 61 Miss., 459, it was held that the production of evidence of a sale to the state was essential, no question of limitation being involved.

In *Dingey* v. *Paxton,* 60 Miss., 1038, it was held that a void assessment to the state was insufficient as a showing that the land was held or claimed by the state the question being determined independently of the limitation of the Code of 1871, and upon the act of 1876, which was essentially different and would have cured all titles had it been valid.

In *Patterson* v. *Durfey,* 68 Miss., 779, and *Carlisle* v. *Yoder,* 69 Miss., 384, the three-year limitation of the Code of 1880 was involved, and the court held that it was applicable although the land was not salable under the Abatement Act because not subject to taxation.

In *Brougher* v. *Stone, supra,* where the same limitation was involved the court held that it was applicable to a case where there was no delinquency or sale of the land for taxes that accrued prior to 1874.

The case of *Hoskins* v. *Railroad Company,* 78 Miss., 768, overruled *Patterson* v. *Durfey* and *Carlisle* v. *Yoder,* the two earlier cases where the land was not subject to taxation, but did not overrule *Brougher* v. *Stone,* where it was shown merely that there had been no delinquency or sale for taxes prior to 1874 so as to warrant a sale under the Abatement Act, the court making as we take it the very distinction here contended for.

The decisions in *Patterson* v. *Durfey,* 68 Miss., 779, and

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Brief for appellant.

Carlisle v. *Yoder,* 69 Miss., 384, were rendered ten years prior to that in *Hoskins* v. *Railroad Co.,* 78 Miss., 768, by which they were overruled. In the interval this property was several times the subject of sale and purchase, and we submit that the rule of property laid down in the earlier decisions, subsequently overruled, should be treated as the law now applicable to the case. *In re* Dunham, Fed. Cas. No. 4147; *City of Kenosha* v. *Lamson,* 76 U. S., 477; *Hollinshead* v. *Von Felahm,* 4 Minn., 190; *Geddes* v. *Brown,* 5 Phila., 180.

The appellees claim that there is no evidence that the taxes were paid by appellants after the purchase from the state by Burroughs in 1888. We insist that the fact that these lands were continuously assessed to Burroughs and those claiming under him from the date of his purchase is at least *prima facie* evidence that the taxes were paid. It was also shown that the land has been the subject of a number of conveyances following the purchase of Burroughs from the state in 1885, all of the deeds thus showing that the land was being dealt in and mortgaged adversely to any right in the complainants being of record in Leflore county. As the bill of complaint shows that the land is wild land uncultivated and unoccupied we insist that the case falls squarely within the decision of this court in a late important decision defining what facts are sufficient to show adverse possession of wild land. *McCaughn* v. *Young,* 85 Miss., 277, 292.

On the authority of this decision it is clear the complainants were barred of all right to recover by § 2730, Code 1892.

In another recent case, however, it is decided that under § 2731, Code 1892, providing that a person claiming land in equity may not bring suit to recover the same but within the period during which he might have brought an action at law, a suit in equity for the recovery of land, concealed fraud excepted, is barred ten years after the complainant's right of action accrued, *without regard to whether defendant has or has*

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not been in the adverse possession of the land. Jones v. *Rogers,* 85 Miss., 802, 836, 837.

Pollard & Hamner for appellees.

The main contention of appellees is that the sale to the state on May 10, 1875, was void. If the sale was an Abatement sale, it must fail, for there is no previous sale to the state and the land was not of the class to be sold. *Dingey* v. *Paxton,* 60 Miss., 1038; *Chambers* v. *Myrick,* 61 *Ib.,* 462; *Chamberlain* v. *Lawrence County,* 71 *Ib.,* 958; *Prophet* v. *Lundy,* 63 *Ib.,* 603. If it is contended by appellants that this was a sale for taxes of 1874, it must fail, as it was made at the wrong time, February 1 being the proper day. Laws 1875, ch. 24, sec. 49. *Gamble* v. *Witty,* 55 Miss., 26; *McGehee* v. *Martin,* 53 Miss., 519; *Mead* v. *Day,* 54 Miss., 58; *Harkreader* v. *Clayton,* 56 Miss., 383.

Neither of the answers filed in this case below claim that sale of May 10, 1875, was an Abatement sale, but both contend that it was a sale for taxes of 1874; this must necessarily be void for the reasons set out. It is now attempted to prove a legal sale under the Abatement Act, in that the assessment rolls showed an assessment to the state in 1875 and that this proves a previous sale to the state. This change of front cannot now be taken advantage of here for the first time as it has never been pleaded. Yet, if the court should hold that the point can now be made for the first time, it is still defeated as the assessment roll is not sufficient proof of ownership; this was the exact point decided in *Dingey* v. *Paxton,* 60 Miss., 1038, and is now the law of Mississippi.

Appellants contend that the three-years statute applies; because the sale of May 10, 1875, was merely irregular and its validity is not questioned. In this they err. Appellees allege that the sale was absolutely void, not merely irregular; that no legal sale of this land could have been made on May 10, 1875; they therefore impeach the sale and the cases of *Nevin* v. *Bailey,*

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62 Miss., 433, and *Gibson* v. *Berry,* 66 Miss., 515, do not apply. See *Hoskins* v. *Railroad Co.,* 78 Miss., 768.

The Abatement sale, or the sale of May 10, 1875, by whatever name it may be called, disposed of, appellants must rely on the ten-years statute and show adverse possession. *McCaughn* v. *Young,* 85 Miss., 289, certainly goes the extreme limit in Mississippi; the instant case falls far short of that. The only tendency even to the proof of adverse possession is scattering assessment rolls; the argument being that this proves payment of taxes and payment of taxes constitutes adverse possession. The assessment roll is not sufficient to prove the payment of taxes. *Dingey* v. *Paxton,* 60 Miss., 1038. Even if payment of taxes had been proven, this is not sufficient to constitute adverse possession. In the *McCaughn case,* taxes were actually proven to have been paid, timber was sold from the land, trust deeds executed and the evidence absolutely showed that the appellee had *actual* knowledge of all these facts. Morover it was proven that the property was of such a nature as not to admit of actual occupation or permanent or useful improvements. There is nothing of the sort proven in the instant case. On the contrary it is shown that the land has been made more valuable by the building of railroads and the development of the country. Development for what? It can only be for the purpose of opening it up and cultivating. The test to be applied then is not the same as in the *McCaughn case.* "The test of what constitutes adverse possession of such property must of course be different from that which would be applied to cultivated lands or property susceptible of actual use and occupation." *McCaughn* v. *Young,* 85 Miss., 292. There is no point of comparison then with the *McCaughn case,* not even the payment of taxes. In the *Dingey* v. *Paxton case,* 60 Miss., 1038, the holder under the tax deed was *actually* in possession of the land and the court held the title void. In *Jones* v. *Rogers,* complainants failed to prove that they ever acquired title in any way. This was sufficient to defeat their

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claim, as they were required to deraign their title and show a perfect chain.

The fact that suit to recover has not been previously filed cannot operate in appellants' favor in this case, admitting that the ten-years statute does apply. There is nothing to determine from what date the ten years is to be reckoned. The time of beginning action cannot be fixed from the date of entry of any former grantee, for *none ever entered* upon the land in controversy or exercised any act of ownership whatever. None of the foregoing conveyances carried any better title than the state had and that title was void. Does the law require the landowner to file suit every time a void deed is recorded against his property and is he guilty of laches when he fails to do so? And we submit that in all fairness there has been no particle of evidence introduced to show abandonment by appellees or their ancestors and abandonment will not be presumed.

Land not taxable was levied upon and sold for taxes; held that the tax deed was absolutely void and therefore the statute of limitations did not run in favor of the holder of the deed from the date thereof and against the original owner of the land or his grantee. *Taylor* v. *Mills,* 5 Kansas, 498.

The court will note that no entry was ever made in this land, no timber sold, no incumbrance placed on it beyond the ten years from the filing of the bill, no actual knowledge given appellees or their grantors and the land not shown to be unsusceptible of cultivation or occupancy, no act of ownership ever shown, not even the payment of taxes.

Argued orally by *T. A. McWillie,* for the appellants, and by *W. H. Hamner,* for the appellees.

WHITFIELD, C. J., delivered the opinion of the court.

The appellees were the real and true owners of the land involved in this controversy, having a perfect paper title thereto from the government down to the late Judge WILLIAM COTH-

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RAN; his title having been derived from a patent from the state of Mississippi to him. William Cothran and his wife, Sarah T. Cothran, died seised and possessed, and the complainants inherit the land from her, being the sons of the said Sarah T. Cothran by her former husband, J. W. Sanders; Judge William Cothran having died intestate in November, 1882, and his widow, Sarah T. Cothran, having died in January, 1892. No pretense of assault is made upon the fact that the complainants were the true legal owners by perfect paper title, properly derived as aforesaid; but the respondents, appellants here, claim the land by virtue of a sale made to the state on the 10th of May, 1875, fortified by the various statutes of limitation usually invoked in such cases, which will be severally noticed.

It is to be especially observed, in the first place, that in the court below, where the learned counsel representing the appellant in this court did not conduct this cause, the respondents based their title in their sworn answer exclusively upon the following allegation: "Your respondents now state, on advice that the taxes due and owing on said land for 1874 not having been paid, said land was sold to the state of Mississippi on May 10, 1875, by the sheriff and tax collector of said county of Leflore, for the payment of said taxes of 1874." And this allegation is several times repeated in said sworn answer of the appellants C. S. Kennedy, A. C. Kennedy, and Fred Blumenberg, and afterwards again emphatically repeated in the sworn answer of the heirs of Fred Blumenberg, who died pending the trial. It will thus be seen that in the court below, throughout, the appellants based their claim of title alone on a sale of the land on the 10th of May, 1875, for the taxes of the year 1874 alone. That contention is, of coure, unsound, and that sale, if regarded as a sale for the taxes of 1874—which was the sole claim of the appellants in the court below—was an absolutely void sale, since the sale day of the land for the taxes of 1874 was in February, and not May. See Laws

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1875, p. 49, c. 24, sec. 49; *Gamble* v. *Witty,* 55 Miss., 26; *McGehee* v. *Martin,* 53 Miss., 519; *Mead* v. *Day,* 54 Miss., 58; *Harkreader* v. *Clayton,* 56 Miss., 383, 31 Am. Rep., 369. When, however, the case gets to this court, a complete change of front is made, the pleadings below absolutely disregarded, and a new defense, not presented by the pleadings or by the proof in the court below, is here for the first time set up, to-wit, that the appellants had a good title under the sale on the 10th of May, 1875, as a sale under the abatement act, and that, if said sale was void for any reason, they are nevertheless protected by § 1709 of the Code of 1871, and by the three-year statute (§ 539 of the Code of 1880), and by the ten-year statute (§ 2730 of the Code of 1892). No such change of front in the face of the pleadings and the proof in the court below can be permitted.

But, if it were allowed, the result must plainly be the same. Treating the sale under which the appellants claim as a sale under the Abatement act, it is an absolutely void sale, for the reason that the appellants who claim under that sale fail utterly to introduce any evidence of any kind whatever to show that the land was of the class subject to sale under the Abatement act. It has been repeatedly decided that it is the duty of the tax purchaser claiming under the Abatement act to show affirmatively by independent proof, other than the tax deed itself, that the land was of the class subject to sale under that act, and as to which, therefore, the tax collector had the power to sell. In *Dingey* v. *Paxton,* 60 Miss., 1038, it was expressly held that "Proof of the fact that a certain tract of land was in 1873 assessed to the state is not sufficient evidence that it was held or claimed by the state under a sale for taxes due prior to the year 1874, so as to bring it within that class of lands which the Abatement act authorized to be sold on the 10th of May, 1875; for, if such sale to the state was made prior to the adoption of the Code of 1871, it could only be proved by the deed from the tax collector, or, if made subsequently, it could

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only be proven by the list of lands sold." Learned counsel for the appellants here assail this decision, and insist it is unsound. They seem, however, to have completely overlooked two subsequent decisions, *Chambers* v. *Myrick,* 61 Miss., 462, and *Chamberlain* v. *Lawrence County,* 71 Miss., 958, 15 South., 40, both of which again review the precise point, and expressly reaffirm the doctrine of *Dingey* v. *Paxton,* 60 Miss., 1038. In *Chambers* v. *Myrick,* Chief Justice CAMPBELL, speaking for the court, referring to the fact that he who claims under the Abatement act must show the land was subject to sale under that act, said: "The appellee failed to show that the land sued for, and claimed by him as having been sold under the Abatement act, approved March 1, 1875, (Laws 1875, p. 11, c. 2), was of the class of lands described by that act, namely, such as were delinquent for taxes for a year prior to 1874 and held by the state by purchase for such delinquency. *Gamble* v. *Witty,* 55 Miss., 26. It was incumbent on him to produce evidence of that. The list of lands sold to the state, certified by the collector, was *prima facie* evidence of the validity of the assessment and sale, and did not import anything as to the particular lands intended to be dealt with by the Abatement act. This was fully considered and decided in *Dingey* v. *Paxton,* 60 Miss., 1038." In *Chamberlain* v. *Lawrence County,* COOPER, J., speaking to the same point, said: "The defendant did not propose to prove that the lands then sold were delinquent for taxes of a year prior to the year 1874, and it was only lands of that class which were subject to sale under the act of March 1, 1875. *Gamble* v. *Witty,* 55 Miss., 26; *Prophet* v. *Lundy,* 63 Miss., 603; *Chambers* v. *Myrick,* 61 Miss., 459; *Dingey* v. *Paxton,* 60 Miss., 1038. It devolves upon one claiming under a sale made under that statute to prove by independent evidence that the land belonged to the class to which the statute applied. *Dingey* v. *Paxton,* and *Chambers* v. *Myrick, supra.*" If anything can be regarded as settled, therefore, it is the soundness of *Dingey* v. *Paxton,* 60 Miss., 1038, in which this point was

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fully considered and decided, to-wit, that the list of lands sold to the state, duly certified by the collector, imports absolutely nothing as to whether the lands sold were of the class dealt with by the Abatement act, but that proof of that fact must be made by evidence independent of such sales list. We thoroughly approve this announcement of the law, and trust it will be questioned no more.

The contention that the ownership by the state of this land could not have resulted from any tax sale later than that of 1874, which must have been for the taxes of 1873, and that this assessment roll shows that the lands were assessed to the state for the year 1875, and that these two facts show that the land was delinquent for taxes that accrued prior to 1874, is not only in the face, as stated, of the pleadings and evidence in this cause, but in the face of the copy of the assessment roll itself, which shows that this particular assessment of these lands was filed August 5, 1875, which fact itself shows that the assessment was based on the very sale of May 10, 1875, in question. The case of *Hoskins* v. *Illinois Central R. R. Co.*, 78 Miss., 768, 29 South., 518, 84 Am. St. Rep., 644, is decisive of the proposition that, where the tax collector has no power whatever to sell, none of these statutes of limitation invoked in this case have any application. The principle of the *Hoskins case* is that land which is sold, in the absence of any power whatever to sell it at all for taxes, can never be held by virtue of the application of any of the statutes of limitation enacted in protection of tax sales. And this case of *Hoskins* v. *Illinois Central R. R. Co.*, expressly overrules *Patterson* v. *Durfey*, 68 Miss., 779, 9 South., 354, and *Carlisle* v. *Yoder*, 69 Miss., 384, 12 South., 255, and by implication, also, necessarily overrules the case of *Brougher* v. *Stone*, 72 Miss., 647, 17 South., 509. The same principle in effect is decided in *Howell* v. *Miller*, 88 Miss., 655, s.c., 42 South., 129. It is of no consequence, whatever, in the application of this principle, that the want of power to sell results from one cause rather than another,

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whether it be because of the nature of the swamp lands, or lands entered under the homestead laws of the United States, or lands pretended to have been sold under the Abatement act, when they were not of the class as to which any power to sell under said act existed. The principle applicable in every such case is the same, to-wit, that, where there is no power to sell, statutes of limitation enacted in the protection of tax titles have no application whatever. Such sales are well characterized in *Hoskins* v. *Illinois Central Co.* as frauds upon the law itself.

It is insisted by the learned counsel for the appellants that this suit is barred by § 2730 of the Code of 1892, as interpreted in *Jones* v. *Rogers,* 85 Miss., 802, 38 South., 742. In that case, at page 836 and 837 of 85 Miss., at page 747 of 38 South., the court said "that adverse possession of defendant has nothing to do with the question, or with the operation of this particular statute. A complainant has a right to bring his suit in equity for land, whether he is in possession or not, and whether defendant is in possession or not; and, if he does not bring it within the period of ten years after his right of action in a court accrues, he is barred." This announcement has been challenged several times in recent cases, but we have never yet had presented to us the actual necessity for dealing with it. That necessity now confronts us. This announcement was not necessary to the decision in *Jones* v. *Rogers,* for the court had already held that the complainants in that case had deraigned no title. That was decisive of the case, and the opinion might well have stopped there. After the most careful review of the case, and of the general law, and of the statute, we are constrained to, and hereby do, disapprove and overrule this announcement of the law as unsound. So many cases are coming to this court based upon this declaration that we feel that it is highly essential that it shall now be expressly overruled, that it may no longer mislead. Said section 2731 is a mere counterpart, in equity, of the similar section (section

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2730) as to ejectments at law, as shown by the very language of the section (section 2731): "Persons claiming land in equity may not bring suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or brought an action to recover the same, if he had been entitled at law," etc. "Recover the land" and "make an entry" are phrases common to both sections 2730 and 2731. The caption of section 2731 is "Same—Limitation as to Suits in Equity," and the section itself is dealing with the right to sue in equity to recover the land, or make an entry on the land, and that in the same time within which the party might have made an entry or sued to recover the land at law. The illustrations which could be given of the disastrous consequences of construing the statute as it was construed in the dictum in *Jones* v. *Rogers* are numerous, and occur at once upon reflection. This very case furnishes a most pointed illustration. Here are the true and original owners of this land, which it is admitted in the pleadings on both sides is wild and uncultivated, and of which there is not a particle of proof that the appellants ever had actual adverse possession; and yet, if the plea set up here could be maintained, as it might be if that decision on this point was sound, these true owners, with a perfect paper title, which gave them the constructive possession of the land, are to lose their land, by the mere flight of ten years' time, in favor of a tax purchaser at a sale absolutely void for the want of any power to sell it, simply because such tax purchaser, never in adverse possesison, and holding a deed void for want of power to sell at all, has not been proceeded against by such true owner. This cannot be the law. This construction of the statute would make it clearly unconstitutional, as depriving the citizen of his property without due process of law.

It was well said in *Dingey* v. *Paxton,* 60 Miss., 1054, in holding section 13 of the act of April 11, 1876 (Laws 1876, p. 172, c. 15), unconstitutional, as follows: "By proceeding

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in *invitum* the state had attempted to acquire title under its laws as then existing, and had failed. By a subsequent law it provides that notwithstanding such failure the shadow of title thus acquired shall become the actual title, unless attacked within a certain time. It is the expiration of time, without regard to possession, which is to transfer title from the owner and vest it in the state or its vendee or donee. The power of the legislature to prescribe within what reasonable time one having a mere right of action shall proceed is unquestionable; but there is a wide distinction between that legislation, which requires one having a mere right to sue to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such; for it is, in its nature, more than that. Its operation is first to divest from the owner the constructive possession of the property, and then to invest it in another, and in favor of the possession thus transferred to put in operation a statute of limitations for its ultimate and complete protection. One who is in actual or constructive possession of his lands, and who has the right of possession and of property, needs no action to enforce his rights. He is already in the enjoyment of all that the law can give him and cannot be disturbed in such enjoyment, except by 'due course of law.' If possession and the right of possession and the right of property are each an element of title, by what right can the legislature divest the one, if it is prohibited by the constitution from interfering with the other? If it be said that the owner of vacant land is only in possession thereof by fiction of law, and that the legislature may at any time destroy such fiction, the reply is that this has not been done, or attempted to be done, by the act under consideration" (nor under § 2731 of the Code of 1892). "The fiction remains, but under it the owner is placed out of, and a stranger is placed in, possession. It is apparent that the effort

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is to do indirectly that which may not be directly done, to divest title by mere legislative decree." We cite this language with our heartiest approval for the purpose of showing indisputably that if this section 2731 has no regard to any question of adverse possession, or to whether the defendant in a particular case has been in the adverse possession of the land, or not, it would be manifestly unconstitutional, and therefore void. But this act is perfectly constitutional. It meant nothing save that one who sues in equity, bringing what is practically an ejectment in equity, must bring it against some person as defendant, and that such defendant must be in the adverse possession of the land. It would be meaningless to talk about suits to "recover the land" and "making an entry on the land," if the contemplation of the statute were not that possession of the land is an essential feature in the very nature of things. It is vital that there shall be a defendant to be sued, and that that defendant shall be in possession of the land sued for, before the limitation set up in this section can be claimed.

It is next insisted that this suit is barred under the decision in *McCaughn* v. *Young,* 85 Miss., 277, 37 South., 839. But the facts of the case at bar are wholly unlike the facts in that case. There is not a particle of proof here that any taxes were ever paid by the appellants. The fact that the lands were assessed to them is no proof of any kind whatever that any taxes had been paid, or of ownership. *Dingey* v. *Paxton,* 60 Miss., 1038. There is no proof here of any timber sold from this land, nor any proof of any actual adverse possession, within the meaning of the law of adverse possession, as immemorially laid down. In *McCaughn* v. *Young,* actual occupancy of the land was shown. It was further shown that the taxes had been paid by Roselle, and that he entered into possession of the land, erected a sawmill upon an adjoining tract, cut all the timber suitable for milling from the land, and sold it. Under one of some trust deeds executed by Roselle the property was sold, and purchased by the Adams Machine Company, which

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remained in possession, and paid the taxes, and offered same for sale, when another bought it, entered into actual possession, cut and deadened timber, and cleared the land for cultivation. There is not one particle of testimony in this case to make out any such facts as existed in *McCaughn* v. *Young*. It therefore has no application. It is idle to say that knowledge of the fact on the part of the true owner that some one had some sort of paper title, good or bad, under which he claimed the land, is the equivalent of actual adverse possession continuing for ten years notoriously, openly, and uninterruptedly. Adverse possession, as known to the law from the beginning until now, is a well-ascertained and well-defined possession. Nothing short of that sort of adverse possession can toll any entry or bar a suit. The adverse possession known to the law from time immemorial is no such airy thing as mere knowledge on the part of the true owner that somebody has some sort of paper title which he asserts for more than ten years against him, without himself ever having had any actual occupancy of the land, and no such doctrine was intended to be announced in *McCaughn* v. *Young*. It is a contradiction in terms to characterize that as adverse possession in respect to which there has never been any possession at all. All that is said in *McCaughn* v. *Young* upon this subject is in reference to the different principles applicable in the case of land susceptible, and land not susceptible, of actual occupation. That is all that the court meant on this subject in that case. It is thus made clear that none of the statutes of limitation invoked is of any avail on the facts which make the case presented for our consideration, and every case is made by its own particular facts.

We say nothing as to the accounting. That the court may deal with when the report comes in. We have held, too often for any further iteration of the principle, that in this state no mere laches, short of the period required by the statute, avails anything; and there is not an element of estoppel shown by the testimony. Solemn paper title, perfect from the govern-

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Statement of the case.

ment down, is of great, definite, fixed value, and cannot be brushed aside by attempting to set up tax titles, absolutely void for want of power to sell, and seeking to make them good by pleading statutes of limitation having no application, and constructing an airy fabric of title so insubstantial, that—

"Like the Borealis' race,
It flits ere you can point its place."

Affirmed.

JASPER F. McCLUSKY *v.* MACK TRUSSEL ET AL.

[44 South., 69.]

MORTGAGES. *Deeds of trust. Foreclosure sale. Constitution* 1890, sec. 111; *Code* 1892, § 2443. *Bulk sales.*

The lump sale under a mortgage or deed of trust of a four hundred acre tract of land is void if made in violation of Constitution 1890, sec. 111, providing for the sale of lands, under decrees and executions in subdivisions not exceeding one hundred and sixty acres, as extended to sales under mortgages and deeds of trust by Code 1892, § 2443.

FROM the chancery court of Calhoon county.

HON. JULIAN C. WILSON, chancellor.

McClusky, appellant, was complainant in the court below; Trussel and others, appellees, were defendants there. From a final decree in defendants' favor the complainant appealed to the supreme court.

The complainant sought by his suit to set aside a sale of the land in controversy made by one Shaw, substituted trustee, in satisfaction of a trust deed executed by complainant's grantor to secure an indebtedness due to one Franks. Complainant alleged that the land, which comprised in all four hundred acres, was sold in bulk, and not in one hundred and sixty acre tracts, as required by Code 1892, § 2443, extending

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Brief for appellant.

the terms of Constitution 1890, sec. 111, to sales under mortgages and deeds of trust. Defendants relied on possession of the property since the date of sale (February, 1895), more than ten years before the filing of the bill (August, 1905); but the testimony as to possession was quite conflicting and, as will be seen from the opinion, the weight of the evidence was against the defense.

Mayes & Longstreet, for appellant.

The land was not sold in the manner prescribed by § 2443, Code 1892, for the sale of lands sold under deeds of trust. This section reads as follows:

"All lands comprising a single tract and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust hereafter executed, shall be sold in the manner provided by section 111 of the constitution for the sale of land and pursuant to a decree of court under execution."

Section 111 of the constitution reads as follows:—

"All lands comprising a single tract sold in pursuance of a decree of court or execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres or one quarter section, and then offered in entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bid for the same in subdivisions as aforesaid; but the chancery court, in cases before it, may decree otherwise if deemed advisable to do so."

The testimony shows that the lands in question compose one tract which was used by McClusky as a pasture. Weir and Trussell, one of the executors, testify that the land was sold in a lump by Shaw to Spencer, upon first bid, and that Spencer was acting for the Franks estate.

Now it is plain that in order for this sale to have been legal the land must have been offered at the sale in subdivisions which clearly it was not, since the land was bought in a lump and on first bid.

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Opinion of the court.

Cowles Horton, for appellees.

No one testified that the sale was not made in subdivisions of one hundred and sixty acres, although Trussell testified that there was but one bid. About this, he was not positive, and we cannot presume that the sale was illegally made; on the other hand, the converse is the presumption. Brame & Alex. Digest, 825.

Argued orally by *Lucius L. Mayes,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The sale was manifestly void, because not made (Code 1892, § 2443) in conformity with the provisions of section 111 of the Constitution of 1890. W. W. Trussell testified: "Mr. J. B. Spencer bid the land off on first bid for the Frank estate. . . . Mr. Shaw sold the whole four hundred-tract in a lump." Volney Weir testified: "The land was sold in a lump on the first bid." The overwhelming weight of the testimony is to the effect, so far as the statute of limitations is concerned, that the purchaser did not enter into possession at the sale, nor within any time which would bar this action. The bill was filed August 30, 1905. The clear preponderance of the evidence—its overwhelming weight, indeed—is to the effect that the appellees and those under whom they claim did not have possession of the land until some time in the year 1896.

The decree is reversed and the cause remanded, in accordance with this opinion.

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Statement of the case.

JESSE JONES ET AL. *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[44 South., 813.]

RAILROADS. *Appliances. Death of employe. Machinery.*

Where the machinery of a railroad company was of a kind in general use, approved by the experience of many roads, and neither defective nor unsafe, the company is not liable for a death resulting from its use, notwithstanding a promise to substitute therefor other and safer machinery which might have prevented the fatal accident.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

Jones and others, appellants, were plaintiffs in the court below; the railroad company, appellee, was defendant there. From a judgment in favor of the railroad company, predicated of a peremptory instruction, the plaintiffs appealed to the supreme court.

The plaintiffs were the next of kin to Scott Jones, a locomotive engineer of the defendant, who was fatally injured by the derailment of the engine which he was operating, caused by striking a cow on the track; the body of the animal passed under the wheels of the engine and caused it to leave the track on a sharp curve. The declaration alleged negligence on the part of the railroad company, in that (1) the engine which was operated by Jones, at the time of his fatal injury, was equipped with what is known, in railroad parlance, as a "standard stub pilot," having a stationary coupler-bar, the pilot being shorter from heel to toe than it should have been, and that the stationary bar of the coupler constituted an obstruction, and interfered with the throwing from the track of objects struck by the engine, and that this condition with respect to the pilot and coupler

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Brief for appellee.

was unsafe, defective and dangerous; (2) that the conditions above set forth had been called to the attention of the railroad company by complaints from the Brotherhood of Locomotive Engineers, a protective order to which Jones belonged, and that the defendant company by its officers had promised to substitute safer appliances.

The railroad company denied that any promise had been made to substitute any other kind of pilot or coupler, and denied that the kind in use on its engine was dangerous, as compared with other kinds, or unsafe or defective in any way, but, on the contrary, constituted the standard pilot and coupler in use on the largest railroad systems throughout the United States; and that in using the same it was not guilty of negligence or failure of duty, and therefore not liable for the injuries to the engineer, under Constitution of 1890, sec. 193. The court below gave a peremptory instruction for the defendant, and the plaintiffs appealed to the supreme court.

McLaurin, Armistead & Brien, for appellants.

[The brief of appellant's counsel was lost or withdrawn from the record before it reached the reporter.]

Mayes & Longstreet, and *C. N. Burch,* for appellee.

It was shown in evidence, and without dispute, that the pilot with the bar-coupler attached, in use on the engine operated by the decedent, was one of a kind in almost universal use by the greater railroad systems of our country. From the depositions of the master mechanics, engine foremen and experienced engineers of several different railroad systems, the appellee proved that many stub pilots, in use on different railroads, were shorter in length than the stub pilots, including the one above mentioned, used on appellee's line. It is true that the appellants offered evidence to the effect that some few systems use a longer pilot and flexible coupler, but while it is always the case that some persons and some corporations will at once

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Brief for appellee.

adopt and experiment with recent inventions and innovations, this does not in any wise render reprehensible the continued use by others of appliances reasonably safe and advantageous. Nor is it contended by the appellants that the use of any other pilot and coupler, even of the kinds advocated or suggested by appellant's, would prevent derailments on account of the engine's striking obstructions on the track. The accident which caused the death of the engineer was one that was unavoidable, in so far as concerned having this or that kind of pilot. The main witnesses for the appellants content themselves with merely saying that other kinds of pilots might probably lessen the chance of rolling the engine from the track on striking obstructions.

The proof utterly failed to show that the pilot in use on the engine operated by the decedent, was in any way defective.

The act of 1898, authorized by sec. 193 of the state constitution, is made to apply to all personal injuries of servants or employes resulting in death, which may be due to the negligence of the master. *Bussey* v. *G. & S. I. R. R. Co.*, 79 Miss., 597. It is shown in evidence that the engineer, Jones, stated to a friend, some short while before the fatal accident, that he hoped there would be a change to a longer pilot and a turn-back coupler. He, therefore, had full knowledge of the condition of the pilot and coupler. And as he voluntarily operated the engine with such knowledge, there can be no liability against appellee based upon sec. 193 of the state constitution, for such section specially excepts from the section "conductors and engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them."

It is not the duty of the master to furnish the best machinery and appliances obtainable. His duty is discharged when he furnishes machinery and appliances which are reasonably safe and suited for the intended use, and of the character ordinarily in use. *Hatter* v. *Illinois Central Railroad Co.*, 69 Miss., 642, 13 South. Rep., 827. See also, to the same effect, *Kent* v.

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Opinion of the court.

Yazoo, etc., R. R. Co., 77 Miss., 494; *Illinois Central R. R. Co.* v. *Woolley*, 77 Miss., 943; *Wonder* v. *B. & O. R. R. Co.*, 3 Am. Rep. (Md.), 146; *Smith* v. *St. Louis, etc., R. R. Co.*, 33 Am. Rep. (Mo.), 484; *Georgia R. R. Co.* v. *Provost*, 3 South. Rep., 764; *Marsh* v. *Chickering*, 5 N. E. Rep., 56; *Louisville & Nashville R. R. Co.* v. *Allen*, 78 Ala., 494.

Argued orally by *A. A. Armistead*, for appellants, and by *J. C. Longstreet*, for appellee.

MAYES, J., delivered the opinion of the court.

On the hearing of this case, after the testimony was all in and the case fully developed, the circuit judge gave a peremptory instruction to find for the railroad company. We think the action of the court was proper. The facts proven did not warrant a recovery. The appliance which it is claimed was defective, and by reason of which it is alleged that Scott Jones lost his life, is one of a kind in universal use and approved by the experience of a number of railroads, and in itself is not defective or unsafe. The change desired in the appliance, which it is contended the railroad company promised should be made, if it be conceded that the facts show there was a promise, was not a defect called to the company's attention and a promise to repair a defect existing in the appliance, but was a promise to change from a safe to a safer appliance. In all the cases cited by the learned counsel for appellants, the facts show, where there was a promise to repair and the master was held liable, it was a promise to repair an existing defect, admittedly so. The proof in this case utterly fails to show that the pilot in use was in any sense a defective pilot. In the language of the case of *Hatter* v. *Illinois Central R. R. Co.*, 69 Miss., 642, 13 South., 827, "to hold the employer liable for the injury sustained would, as it appears to us, be to declare that railroads are responsible for injuries to their servants in all

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Brief for appellee.

cases in which the safest appliances in use are not secured by them." We cannot so hold.

Affirmed.

WHITFIELD, C. J., dissents.

KOSCIUSKO OIL MILL & FERTILIZER COMPANY *v.* WILSON COTTON OIL COMPANY.

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[43 South., 435; 8 L. R. A. (N. S.,) 1053.]

TRUSTS AND COMBINES. *Contracts. Laws* 1900, *ch.* 88, *p.* 125.

A contract between two cotton seed oil manufacturers is invalid, where it purports to bind one of them, in consideration of the withdrawal by the other of an agent for the purchase of cotton seed from designated territory, to protect the other from liability to the withdrawn agent and furnish an agreed quantity of seed during the season at a named price, under Laws 1900, ch. 88, p. 125, defining a trust or combine to be, among other things, a combination to hinder competition in the purchase of a commodity, and making illegal every contract relative to the business of a trust or combine.

FROM the circuit court of Holmes county.

HON. A. McC. KIMBROUGH, Judge.

The Kosciusko Oil Mill & Fertilizer Company, appellant, was the plaintiff in the court below; the Wilson Cotton Oil Company, appellee, was defendant there. From a judgment in favor of the defendant, predicated of a peremptory instruction, the plaintiff appealed to the supreme court.

The opinion of the court states the facts.

Noel & Pepper, for appellant.

Tackett & Smith, for appellee.

[The briefs of counsel on both sides were lost and did not reach the reporter; hence a synopsis cannot be given of them.]

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court.

This is a suit in assumpsit, in which appellant is the plaintiff and appellee is defendant, wherein the plaintiff seeks to recover damages alleged to have been sustained by it by reason of defendant's breach of a contract entered into between them on the 28th day of September, A. D. 1903. At the close of plaintiff's evidence the court, on motion of defendant, excluded same from consideration by the jury and instructed the jury to find for the defendant, which was done by the jury, and judgment rendered accordingly.

The statute which it is alleged makes the contract in question void is, so far as its provisions affect this case, as follows:

"An act to define trusts and combines, to provide for the suppression thereof, and to preserve to the people of this state the benefits arising from competition in business.

"Section 1. Be it enacted by the legislature of the state of Mississippi, that a trust and combine is a combination, contract, understanding or agreement, express or implied, between two or more persons, corporations, or firms or associations of persons, or between one or more of either with one or more of the other: (a) In restraint of trade; (b) to limit, increase or reduce the price of a commodity; . . . (d) intended to hinder competition in the sale or purchase of a commodity; . . . (i) to unite or pool interests in the importation, manufacture, production, transportation, or price of a commodity—and is inimical to the public welfare, unlawful and a criminal conspiracy."

* * * * * * * * *

"Section 3. Every contract or agreement to enter into or pursue any trust and combine, and every contract or agreement made by another with any trust and combine, or with any member of a trust and combine, for any purpose relative to the business of such trust and combine, is void, and cannot be enforced in any court."

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Opinion of the court.

"Section 11. This act shall be liberally construed in all courts, to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state."

Laws 1900, pp. 125, 126, 129, c. 88.

It will be noted that the title of this act is "An act to provide for the suppression of combines and trusts and to preserve to the people of this state the benefits arising from competition in business," and that sec. 11 expressly requires all courts in this state to liberally construe this act, to the end that trusts may be suppressed and the benefits arising from competition in business preserved to the people of this state.

On, prior, and subsequent to the 28th day of September, A. D. 1903, appellant and appellee were both engaged in the business of purchasing cotton seed and converting same into oil, meal, and other manufactured articles; appellant's mill being located at Kosciusko, and appellee's at Lexington, Mississippi. One Potts was president and C. A. Jones was secretary and treasurer of appellant company, and G. A. Wilson was president of appellee company; both being corporations. On the 28th day of September, A. D. 1903, C. A. Jones came to Lexington for the purpose of establishing a seed agency for appellant, and entered into a contract with one J. M. Clower to purchase seed at said place for appellant during the seed season then commencing. After this contract with Clower had been made, but as part of the same transaction, and just afterwards, the contract sued on was entered into between appellant and appellee, and what occurred relative to the making thereof can best be told in the language of Jones himself. He was asked this question: "Examine the paper now shown you, and see who wrote it, and when it was written." To which he made the following answer: "September 28th was the date. I wrote this contract, the one for Mr. Clower, and the one for the seed was written by Mr. Wilson. I came to Lexington under the instructions of Mr. Potts to establish a seed agency here and to

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secure a house and men, and I was instructed to go to Mr. Wilson and tell him we were not coming into his town through any personal animosity to him, but simply on a matter of business, as other people were buying in our town, and I made that statement to Mr. Wilson, and he brought up something about an agreement and I told him where he could find Mr. Potts (that is, over the phone), and he claimed he never got him, and he did talk to our vice-president, and he told him whatever I did in the premises was satisfactory; and I went to Mr. Wilson's house two or three times, and told him I was compelled to make arrangements here, and he made me a proposition to ship us three hundred tons of seed, provided we would not buy here, and would hire Mr. Clower and turn the contract over to him, and he would pay this, pay his salary, and this contract was the outcome of that agreement."

The contract referred to in the latter part of Jones' answer, and the one sued on, is as follows:

"This contract, made this the 28th September, 1903, by and between Wilson Cotton Oil Co., of first part, and Kosciusko Oil Mill & Fertilizer Co., of second part, shows that in consideration of (300) three hundred tons of sound cotton seed, to be shipped to the second party during the season 1903–4 by the first party at Lexington, Miss., prices then being paid from Sidon, Miss., or from points where the freight rate is not greater to Kosciusko, the second party has this day assigned to the first party a contract it has with one J. M. Clower to buy seed in Lexington, and the first party is to pay the salary and charges therein mentioned as they fall due each month, and to furnish a seedhouse and scales to use in buying seed during the months of October, November, and December, 1903, and to furnish money to pay for the seed bought by the said Clower, through to second party, and by the second party deposited in the Bank of Commerce of Lexington, Miss., which is to be paid out on the said tickets issued by said Clower; and the seed so bought is to be the property of the first party

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and subject to its control as soon as bought. The second party agrees to keep this contract a secret and not to inform said Clower or any one else of its terms. The Lexington prices not to exceed the prevailing prices at point of shipment and seed to be delivered for shipment to second party by February 1, 1904. The prices of seed to be paid by said Clower are to be dictated by the first party at any and all times, and the reports made by said Clower to the second party are to be forwarded to the first party by mail or express. [Signed] Wilson Cotton Oil Company, by G. A. Wilson, President Kosciusko Oil Mill & Fertilizer Company, by C. A. Jones, Secretary and Treasurer."

After the execution of this contract, appellant withdrew from competition with appellee in the purchase of seed at Lexington, and on the failure of appellee to ship it the three hundred tons of seed referred to in said contract this suit was instituted to recover the profit appellant alleged that it would have made by crushing and manufacturing said seed.

It will be observed that the contract, set out above, of the 28th of September, 1903, between the two oil mills, is the contract sued on, and it is too plain to need discussion that the express object of that contract was to suppress competition in the territory about Lexington in the purchase of cotton seed. It is impossible for language to make such illegal purpose plainer. It will also be noted that the testimony in the case establishes beyond controversy the fact that the execution of this contract actually had the effect of securing to the Lexington oil mill a monopoly in the purchase of cotton seed in that territory; the appellant withdrawing from that territory immediately upon the execution of this contract. It will be specially noted that the witness Jones said this contract here sued on was "the outcome of the agreement" that the appellant would not buy cotton seed in the Lexington territory. This contract, therefore, is not like the contract in the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 547, 22 Sup. Ct., 434,

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46 L. Ed., 679. It was said there "that the plaintiff's cause of action is in no legal sense dependent upon, or affected by, the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon, in this action, to enforce any contract tainted with illegality, or contrary to public policy." The direct converse is true here. The contract upon which the plaintiff sues is directly connected with, and, as the witness states, grows directly out of, the contract to suppress competition, and this contract could not possibly be enforced without aid from the contract out of which it grows, and without calling that contract into view. This contract sued on is simply the consummate flower of the other contract, out of which it grows, which is the stem. This contract is directly and inseparably connected with the trust combination out of which it grows. There can be no doubt, under this state of facts, that this contract here sued on is absolutely void under section three of the anti-trust act (Laws 1900, p. 126, c. 88), and that the instruction of the court was correct. We said in the case of *Yazoo, etc., Railroad Co.* v. *Searles,* 85 Miss., 528, 37 South., 942, that the phrase "inimical to the public welfare" was a legislative declaration that all the contracts condemned by this anti-trust statute were so "inimical, were unlawful, and were a criminal conspiracy." It is not left to the courts to say that such contracts are inimical to the public welfare, but the legislature itself has characterized such contracts as being inimical to the public welfare by this legislative declaration. Whenever, therefore, it is shown that a contract is of the kind mentioned in the act, it is by legislative declaration instantly made a contract "inimical to the public welfare, unlawful, and a criminal conspiracy." The case of *Yazoo, etc. Railroad Co.* v. *Searles,* 85 Miss., 528, 37 South., 942, expressly declares that "the benefits which the legislature sought to secure to the people of the state were those which naturally flow from competition in business." That case again declared

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that "all contracts whether expressed or implied, which would necessarily or probably have any of the ill effects therein forbidden, were declared to be violative of the announced public policy of the state, in that they inevitably tended to reduce the benefits sought to be secured by the act." And again that case declared that "the test, and the only test, in determining the validity of a contract under this act, is not what the intent of the parties may be, not what form the combination has taken, but what will its probable effect be?"

The probable effect of the contract in this case is manifestly to suppress all competition within the territory named in the purchase of cotton seed. Nor is it any answer to say, if the fact had been so, that competition in the purchase of cotton seed was not in fact destroyed, or that the price of seed was not in fact reduced; the necessary tendency of the contract being to that end. The supreme court of Ohio, in *Central Ohio Salt Co.* v. *Guthrie,* 35 Ohio St., 666, replying to this very argument, said: "The courts will not stop to inquire as to the degree of injury inflicted upon the public. It is enough to know that the inevitable tendency of such contracts is injurious to the public." And this language was approved by the supreme court of the United States in *Northern Securities Co.* v. *United States,* 193 U. S., 340, 24 Sup. Ct., 436, 48 L. Ed., 679; and in the case of *C. E. Knight Co.,* 156 U. S., 16, 15 Sup. Ct., 249, 39 L. Ed., 325, the court said: "Again all the authorities agree that, in order to vitiate a contract or combination, it is not required that its result should be a complete monopoly. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition." And in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S., 244, 20 Sup. Ct., 108, L. Ed., 136, the court said: "Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination, in limiting and restraining the right of each of the members to transact business in the ordinary

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way, as well as its effect upon the volume or extent of the dealing in the community that is regarded." In *Insurance Companies* v. *State,* 75 Miss., 24, 22 South., 99, we said, some ten years since: "Conspiracies of this class are raised to the grade of felony, and pronounced obnoxious to the public policy of this state and inimical to the public welfare, by reason of the great mischief they are known of all men to accomplish, as manifested by the course of legislation and decision the country over. Such trusts constitute one of the greatest menaces to public welfare known to modern times, and the legislature has wisely made them felonies, and denounced this severe penalty against them." What has occurred in the decade since that expression was uttered by this court has put its truthfulness in tenfold clearer light. The question of the political day is whether the trusts shall own and control the government, or whether the government shall regulate these trusts, so outrageous have their iniquitous practices become. It is the duty of this court to obey the mandate of the legislature to construe this act liberally, to the end that trusts shall be suppressed, and competition, open and fair, be maintained within the borders of this state.

Section 4 of the anti-trust act, *supra* (Laws 1900, p. 127, c. 88), provides as follows: "Every corporation which shall be a trust and combine or enter into, be concerned in, or share in the profit or loss of any trust and combine shall forfeit its charter and franchise, and if a foreign corporation, shall forfeit its right to do business in this state. It is hereby made the duty of the attorney-general of this state to enforce this provision by a proceeding in the nature of writ of *quo warranto* or any other appropriate remedy upon his own motion, or upon the relation of any person whose rights are invaded or interests threatened by any trust and combine." The able and accomplished attorney-general will doubtless promptly proceed against the members of this trust; the evidence in this case

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Syllabus.

clearly establishing the fact that a trust existed between the two corporations involved.

The judgment is affirmed.

GULF & SHIP ISLAND RAILROAD COMPANY v. WIRT ADAMS, STATE REVENUE AGENT (TWO CASES)

AND

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. WIRT ADAMS, STATE REVENUE AGENT (TWO CASES).

[45 South., 91.]

1. CONSTITUTIONAL LAW. *Obligation of contract. Railroad charter. Constitution of U. S., article 1, sec. 10. Constitution 1890, sec. 16.*

Where chartering a railroad corporation by direct legislative act the state granted it the right to fix, within maximum and minimum limits, the rates to be charged by it for carrying persons and property, the grant is inviolate, under Constitution of the United States, article 1, sec. 10, prohibition the impairment of the obligation of contracts.

2. SAME. *Laws 1898, p. 66. United States Constitution XIV Amendment. Constitution 1890, sec. 112. Due process of law. Corporate franchises. Taxation. Double taxation.*

Laws 1898, p. 23, sec. 66, purporting to impose on each railroad company claiming an exemption from state supervision, under maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing the obligation of contracts shall not be passed, since it impairs

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Statement of the case.

the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(c) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

(d) Considered as an *ad valorem* tax on the value of the exemption as property the additional privilege tax is violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since the revenue laws provide that there shall be an assessment of railroad property for *ad valorem* taxes by the railroad commission, values to be fixed with reference to the earning capacity of the companies and their franchises, and it must be presumed that the commission has considered the exemption as an element of property value.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Adams, State Revenue Agent, the appellee, was plaintiff in all the suits; the Gulf & Ship Island Railroad Company, appellant, was defendant in two of them and the Yazoo & Mississippi Valley Railroad Company, appellant, was defendant in the other two. The defendants, appellants, demurred to the respective declarations against them and the court below overruled the demurrers in each case. The defendants did not ask to plead further and final judgment in each case was rendered in plaintiff's favor and the defendants each appealed to the supreme court in the cases against them respectively.

The suits were efforts by the State Revenue Agent to recover of the defendants, railroad companies, the additional privilege taxes of $10 per mile for several years—the two suits against each defendant were for taxes of different years—assessed by the Railroad Commission against them under sec. 66, p. 23, Laws 1898, as being railroads "claiming exemption from state supervision under maximum and minimum provisions of their charters."

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Statement of the case.

The act of the legislature in question is as follows:

"Section 1. *Be it enacted by the legislature of the state of Mississippi:* That a privilege tax is levied as follows on the following industries carried on in this state. . . .

* * * * * * * * *

"Section 66. Railroads.—Railroads are divided into four classes, first, second, third and narrow gauge, and privilege taxes are levied on them as follows:

On each railroad of first class, per mile	$20 00
On second class per mile	15 00
On third class per mile	10 00
On narrow gauge per mile	2 00
On each railroad claiming exemption from state supervision under maximum and minimum provisions in their charter, an additional privilege tax, per mile of	10 00

"The Railroad Commission shall annually, on or before the first Monday of August, classify the several railroads according to such charter exemption claims and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the railroad commission shall be certified to the auditor of public accounts, and the chancery clerks of the counties through which each road runs."

Section 19 of the Gulf & Ship Island charter, under which exemption from state supervision was claimed, is as follows:—

"Section 19. Be it further enacted, that said company shall have and possess the power of fixing, from time to time, by its board of directors, the rates at which it will do express or telegraph business, and also the rates at which said company will transport persons or property over its railroads and branches; provided said last mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates on freights: sixty-five cents per hundred pounds for

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transporting first, or second class freights one hundred miles or less; forty-five cents per hundred pounds for transporting third or fourth class freight one hundred miles or less; thirty-two cents per hundred pounds for transporting fifth or sixth class freights one hundred miles or less (reference being had herein to the classification of freights now recognized and observed on the existing line between New Orleans and Jackson, Mississippi); but in no case shall the railroad company be limited to a less charge than twenty-five cents, for the transportation of any passenger, or parcel, or package or article, however short the distance. The rates so established from time to time by said board of directors, for transporting persons or property as a railroad company, not exceeding the maximum rates for said railroad business as above set out, may be charged and collected by said company."

Section 6 of the Yazoo & Mississippi Valley charter, under which exemption from state supervision was claimed, is as follows:—

"Section 6. Be it further enacted that said company shall have and possess the power of fixing, from time to time, by its board of directors, the rate at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rate at which said company will transfer persons or property over its railroad and branches, provided said last-mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight: Sixty-five cents per hundred pounds for transporting first or second class freight, one hundred miles or less; forty-five cents per hundred pounds for transporting third and fourth class freights one hundred miles or less; thirty-two cents per hundred pounds for transporting fifth or sixth class freight one hundred miles or less (reference being had herein to the classification of freights now recognized and observed on the existing railroad line

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Statement of the case.

between New Orleans, La., and Jackson, Miss). But in no case shall the railroad be limited to a less charge than twenty-five cents for the transportation of any passenger, parcel, package, or article, however short the distance. The rates so established from time to time by the board of directors for transporting persons or property as a railroad company, not to exceed the maximum rates for railroad business as above set out, may be charged and collected by said company. . . . Provided, further, that as to lumber, coal, iron, salt, machinery, fertilizer, bricks, lime, agricultural implements, steam engines, and boilers, and other freights transported in car load lots, rates may be made by special agreement between the shippers and the company for such sum as they may agree upon; but in all such cases the same rates shall be given to any shipper of an equal quantity at the same time, under similar circumstances, of similar freight between the same points. Nothing herein contained shall prevent the railroad company from making such reduction of rates below the minimum herein fixed as it may elect to do for the purpose of fostering, aiding and developing resources of the country penetrated by its railroad branches."

Suits between the same parties involving the validity of the statute, Laws 1898, p. 23, sec. 66, were heretofore decided by this court. *Railroad Co.* v. *Adams,* 83 Miss., 306, 36 South., 144, *Railroad Co.* v. *Adams,* 85 Miss., 772, 38 South,. 348. The cases first cited (83 Miss., 36 South.) were suits for the additional privilege taxes for the years 1898, 1899, 1900, 1901 and 1902, and, while involving the constitutional question now decided, they were resolved in favor of the railroad companies because of a failure on the part of the state railroad commission to classify them under the statute as being liable for the additional tax; the constitutional question was reserved because unnecessary to the decision of those cases. The second appearance of the suits between the same parties (85 Miss., 38 South.) involving the

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Brief for appellant.

same statute arose from an effort of the state revenue agent to have the state railroad commission back classify the appellants so that the back classification could be made the basis for collecting the additional tax which had been adjudged uncollectible for want of such a classification. These cases also involved the constitutional question decided in the present cases, but it was again pretermitted, the court holding that there was no power in the railroad commission to back classify under the statute. The present suits were respectively for the taxes of 1903 and 1904, for which years the state railroad commission had formally classified the appellants as being liable for the additional $10 per mile privilege tax."

McWillie & Thompson, and *J. H. Neville,* for appellant, the Gulf & Ship Island Railroad Company.

The charter of appellant company, of which this court takes judicial notice, *Mississippi Railroad Commission* v. *Gulf & Ship Island Railroad Co.,* 78 Miss., 750, is found, Laws of Mississippi 1882, pp. 849–862.

Is section 66, Laws 1898, p. 23, constitutional?

The section violates both the state and national constitutions, in this: that it impairs the obligations of contracts between the state and appellant, evidenced by the nineteenth section of appellant's charter.

Equality and uniformity, as far as the same can be obtained, are required in the imposition of privilege as well as *ad valorem* taxes. This was decided by this court in the case of *Adams, State Revenue Agent* v. *Mississippi Lumber Co.,* 84 Miss., 23 s.c., 36 South. Rep., 68. We have not failed to observe the case of *Clarksdale Insurance Agency* v. *Cole,* 87 Miss., 637, wherein the court seems to have ignored the *Mississippi Lumber Co. case* (84 Miss., 23). We trust the two cases can be reconciled, but whether they can be or not, we think the earlier decision the correct one. The court,

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however, is respectfully referred to what Judge Cooley says on the subject, Cooley on Taxation (2d ed.) p. 169–170.

"But are there not cases which on their faces are manifestly so unequal and unjust as to furnish conclusive evidence that equality has not been sought for, but avoided; that oppression, not justice, was desired, and confiscation, not taxation, intended? Such cases it is surely possible to conceive, and if such has never been the intent of the legislation, it is certain that it has sometimes been the result.

"A license tax might not be unjust though laid upon a single occupation, provided that it was so laid that none who followed that occupation escaped it. Let it reach all of the class, either of persons, or things, it matters not whether those included in it be one or many, or whether they reside in any particular locality or are scattered all over the state. But when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible. It is immaterial on what ground the selection is made; whether it be of residence in a particular portion of the taxing district, or because the persons selected have been remiss in meeting a former tax for the same purpose, or because of any other reason, plausible or otherwise; for if the principle of selection be once admitted, limits cannot be set to it, and it may be made use of for the purpose of oppression, or even of punishment."

This proceeding is a demand on the part of the state for an additional tax as a condition to the exercise of a right granted in a charter. It is not a tax on a business or calling, or occupation, for that is already taxed and the tax has been paid. It is an additional charge laid on a particular clause in a charter. It is a demand made on this appellant, a third class railroad, different from that made on *other third class railroads,* and the demand is sought to be justified on the idea that appellant possesses a right which the state may separately

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and additional tax. In other words the tax is not levied because of the classification of the road as provided in the act of 1898, but because of a rate-making power granted in the charter. It is an attempt by the exercise of the taxing power to specially burden a particular clause, or right, in the charter and by increasing that burden to the point of prohibition, to destroy the right. It is an indirect and insidious attempt to impair the force of the contract made by the state, the validity of which has been upheld by this court, under the guise of taxing its exercise.

On the general proposition that a state may not pass any act impairing the obligations of a contract, and of the existence and validity of this contract there can be no doubt, since this court has upheld it, the discussion by the supreme court of the United States in the case of *Fletcher* v. *Peck,* 9 Cranch, 87, is conclusive.

Said Chief Justice MARSHALL in *Marbury* v. *Madison,* 1 Cranch, 137:

"The government of the United States has been emphatically termed a government of laws and not of men, and it will certainly cease to deserve the high appellation if the laws furnish no remedy for the violation of a vested legal right."

In *Poindexter* v. *Greenhow,* 114 U. S., 270, the supreme court of the United States said:

"What we are asked to do is, in effect, to overrule the doctrine in *Fletcher* v. *Peck,* 9 Cranch, 87, and hold that a state is not under a constitutional obligation to perform its contracts; for it is equivalent to that to say that it is not a subject to the consequences when that constitutional prohibition is applied to suits between individuals. We could not stop there. We should be required to go still further, and reverse the doctrine on which that constitutional prohibition rests, stated by Chief Justice MARSHALL in that case, when he said, 'When, then, a law is in its nature a contract, when absolute rights have been vested under that contract, a repeal of the law can-

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not divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual of the community. It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of legislative power, is well worthy of serious reflection. And in view of such a contention, we may well add the impressive and weighty words of the same illustrious man, when he said in *Marbury* v. *Madison,* 1 Cranch, 137, 'The government of the United States has been emphatically termed a government of laws, not of men.' It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." . . .

"The true and real commonwealth which contracted the obligation is incapable, in law, of doing anything in derogation of it. Whatever having that effect, if operative has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been." . . .

"Virginia, by a contract which the constitution of the United States disables her from impairing, has bound itself that it shall be otherwise. The state has agreed that the coupons cut from her bonds shall be received in payment of taxes due to her, as though they were money. When the taxpayer has tendered such coupons, he has complied with the agreement, and in legal contemplation has paid the debt he owed the state. So far as that tax is concerned and every step taken for enforcing its payment in disregard of that tender, the coupon holder is withdrawn from the power and jurisdiction

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of the state. He is free from all further disturbance, and is securely shielded by the constitution in his immunity. No proceeding, whatever its pretext, which does not respect this right, can be judicially upheld. The question is not of the reasonableness of a remedy for a breach of the contract to receive the tendered coupons in payment of the tax; it is whether the right to have them so received, and the use of that right as a defense against all further efforts to exact and compel payment of the tax, in denial and defiance of that right can be taken away without a violation of that provision of the constitution which prohibits the states from passing laws which impair the obligations of contracts. Certainly, a law which takes from the party his whole contract, and all the rights which it was intended to confer must be regarded as a law impairing its obligation."

So strictly has the prohibition against the impairment of the obligation of contracts been enforced that it has been repeatedly held that it is incompetent for a state to so materially change the remedy as to any existing contracts as to seriously impair or impede proceedings upon it.

"Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment. The obligation of a contract is the law which binds the parties to perform their agreement. Any impairment of the obligation of a contract, the degree of impairment is immaterial, is within the prohibition of the constitution. The states may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The states are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the constitution applies with the same force

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and effect, securing the substantial means of enforcement of a contract which existed when it was made. The guaranty of the constitution gives it protection to that extent. *Von Hofman* v. *Quincy,* 4 Wall, 535; *Walker* v. *Whitehead,* 16 Wall, 314; *Poindexter* v. *Greenhow,* 114 U. S., 270.

In *St. Ann's Asylum* v. *New Orleans,* 105 U. S., 362, it was held, Mr. Justice BRADLEY speaking for the court, that the imposition of a tax contrary to the terms of a charter could not be justified under the state's rights to dissolve a corporation, the idea of a tax being to destroy the franchise.

If the power to dissolve a corporation cannot be exercised by taxation, does it not follow as a necessary consequence that a valid grant cannot be destroyed by the use of the taxing power? In other words the state cannot indirectly avoid the force of its contract by placing such an embargo upon its exercise as to make it impossible to enjoy it.

The case of *Murray* v. *Charleston,* 96 U. S., 432, is nearly in point. In that case the City of Charleston had issued certain certificates which were known as stock in the city, but which were in reality, evidences of indebtedness. Some of these were held by Murray, a resident of Germany. The city, acting under a very ancient charter antedating indeed the constitution of the United States, undertook to domicile within the city all of the indebtedness due by the city for the purpose of taxation, and levied a tax thereon. In order to secure payment it provided that the amount of the tax should be deducted from the interest due on the debt, and that the said interest should be paid, less the amount of the taxes levied. The attempt was held unconstitutional and the language of the court is exceedingly appropriate to the instant case. We quote:

* * * * * * * * * *

"What then is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends

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money to a state, or to a municipal division of the state having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise money out of the contributions promised to be paid before payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would involve two contradictory things an obligation to do, and a right not to do—an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract, a principle which goes in destruction of it. The truth is, states and cities when they borrow money and contract to repay it with interest are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity. . . . .

"The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligations; for such a law . . . relieves the parties from the moral duty of performing the original stipulations of the contract and it prevents their legal enforcement.

"We do not care now to enter upon the consideration of the question whether a state can tax a debt due by one of its citizens or municipalities to a nonresident creditor, or whether it has any jurisdiction over such a creditor or over the credit he owns. Such a discussion is not necessary, and it may be doubtful whether the question is presented to us by this record.

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Brief for appellant.

It is enough for the present case that we hold, as we do, that no municipality or state can, by its own ordinances, under the guise of taxation, relieve itself from performing, to the letter, all that it has expressly promised its creditors."

What was thus said, it is true, was in a case where the question was, whether a tax thus imposed upon a nonresident holder of bonds issued by a company chartered by the state, was warranted by the constitution. But so far as it speaks of what constitutes impairment of the current obligation it is applicable, in its fullest extent to all legislation affecting contracts, no matter who may be the parties.

See also *N. Y., L. E. & W. Ry. Co.* v. *Penn.*, 153 U. S., 628.

Is it permissible for the state, after having granted to a railroad company the right to fix its own charges for transportation of persons and freight, within maximum and minimum limits, beyond the control of the legislature, to make the claim of such a grant, its ownership or exercise, an independent subject of taxation; or can the state tax such a company more than it taxes other like companies not having such a grant, for carrying on the same business?

If the legislature can tax such a grant to the extent of $10 per mile it can tax it $10,000 per mile. If the power exists there is no limit to it. If the purpose or effect of the law is to destroy the grant then the law is void.

A perfectly parallel case to those under consideration arose in the early days of the government and was decided by the supreme court of the United states in a masterly opinion by Chief Justice MARSHALL. *Weston* v. *Charleston,* 2 Peters (U. S.), 449.

There the City of Charleston by an ordinance undertook to tax "stock of the United States"; the stock being simply an evidence of a contract by which the general government obligated itself to repay borrowed money. The act of congress authorizing the issuance of the stock did not, as do many subsequent acts providing for the issuance of bonds, expressly

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exempt the stock from taxation. The supreme court of the United States treated the ordinance in question as standing upon the same basis as would an act of the state legislature and held it void, deciding:

(a) That the stock was nothing but the evidence of a debt created by the general government in the exercise of its power "to borrow money on the credit of the United States."

(b) That the tax sought to be laid, while nominally upon the stock, the evidence of the contract, was in fact on the contract itself and, therefore, a tax on the power of congress to borrow money on the credit of the United States.

(c) That a tax upon a power, a right to do a particular thing, is a burden on the exercise of the power, a burden on the right to do.

The application of *Weston* v. *Charleston,* to the cases before us is plain. Only by implication are the states forbidden to encroach upon or impair the powers of congress to borrow money on the credit of the United States, they are expressly prohibited from impairing the obligations of a contract; certainly the express prohibition is not of less force than the implied one.

If, as decided by the supreme court of the nation, speaking through Chief Justice MARSHALL, a tax levied upon the evidence of a debt created by a contract be in fact upon the contract itself and an impairment of the power of the general government to make that contract, surely the statute in question (Laws 1898, sec. 66, p. 23) seeking to impose an additional privilege tax on "each railroad claiming exemption from the state supervision under maximum and minimum provisions in their charters, is a tax upon the contract evidenced by the charter, and therefore, a tax upon the right granted by the contract."

If, as decided by the supreme court of the nation, speaking through the same distinguished chief justice, a tax upon a power, a right to do a particular thing, is a burden on the

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exercise of the power, a burden on the right to do, surely the tax in question in these cases is a burden on the appellant's right, within certain limits to be exempt from supervision by the railroad commission and an impairment of the contract by which the state granted appellant such exemption.

It was held in *McCullough* v. *Maryland,* 4 Wheaton, 316, 436, that a state had no power by taxation to impede, burden or in any manner control the operation of the constitution and laws enacted by congress to carry into execution the powers vested in the general government and this doctrine was amplified and applied in *Weston* v. *Charleston, supra.*

A state has no power, by taxation or otherwise, to impair the obligation of a contract; this want of power is just as absolute as is the want of power to impede, burden or in any manner control the operation of the constitution and laws enacted by congress. If to tax a contract be to burden the right to make it or to act under it, and we have seen that it is, then it follows that the statute in question impairs the obligation of the nineteenth section of appellant's charter and is void.

Brown v. *Maryland,* 12 Wheaton, 419, is worthy of note in this connection. In that case it was concluded that a license tax required of an importer to sell his goods, while held in bulk as imported, was a tax upon his occupation, but the court decided that this was only changing the form without varying the substance of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

The tax under consideration in these cases is nothing less than a tax on the charter exemption; the contract made by the state granting the exemption to the appellant. This contract can no more be impaired by taxation than it can be impaired in any other way. The cases above cited are all approved in

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the more recent case of *Home Insurance Co.* v. *New York*, 134 U. S., 594.

Whatever the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. *County of Santa Clara* v. *Southern Pac. Railway Co.*, 18 Fed., 385, 406. Of course the state cannot impair the obligation of its own contract and it seems to us to be clear that to tax the state's contract is to impair it and that the tax under consideration is sought to be laid upon the contract.

If to tax a power of the federal government is to impair it, how much more is a tax upon a contract granting an exemption an impairment of it? Suppose, instead of an exemption from supervision, an exemption, a perfectly valid one, from taxation itself were before the court. We would then have the state granting an exemption from taxation and then taxing the exemption. Of course such a tax would not only be void but absurd, a contradiction in terms. If the state place herself under obligation not to exact taxes from a party she cannot at the same time bind the party to pay her taxes in whole or in part. There is no difference in principle where the exemption sought to be avoided is one from taxation or one of the kind involved in the consideration of this case.

McGehee, in his work on "Due Process of Law," p. 63, tells us that a statute is invalid if its ostensible purpose be seen to be a mere cover for carrying out purposes having no relation to the classification adopted, citing *Lochner* v. *New York*. 198 U. S., 45.

The history of the statute under consideration leaves no room to doubt that its real purpose was and is to force appellant, and the Yazoo & Mississippi Valley Railroad Company to surrender their contract exemption from supervision and every member of this court must know the fact to be as stated.

The grant under consideration is one that has been ad-

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judicated to be valid. *Stone* v. *Natchez, etc., R. R. Co.*, 62 Miss., 646; *Mississippi Railroad Commission* v. *Gulf, etc., R. R. Co.*, 78 Miss., 750. The right given by the grant being beyond legislative power to revoke, is equally beyond legislative power to impair. While the right is one created by law, it has all the sanctity of a natural right and is removed beyond legislative power to as great an extent as any natural right can be so removed.

The legislature, of course, has power to tax property and to impose privilege taxes on persons and occupations, but it must exercise such power so as to make the burdens of government equal and uniform, so far as concerns property at least, and when it comes to impose licenses and privilege taxes arbitrary classification is forbidden. We have said the right granted by its charter to appellant to fix its own charges for transportation of persons and freight within the statutory limits is removed from legislative control to as great an extent as is any natural right. Suppose a $10 privilege tax was sought to be imposed on all lawyers, and an additional privilege tax of $10 on all of them who had blue eyes. What would the courts say of such classification? Unquestionably a law so providing would be held void, the classification would be held arbitrary and unreasonable. It would be no answer to say that oculists all agree that blue eyes are the best and most valuable of eyes, or to prove their superiority by all the experts on the subject. Nor, in this case, is it any answer to our contention to claim that the grant is itself a thing of value. Personal beauty is a thing of value, but not a subject of taxation. Those whom God hath created handsome are not subject to an additional privilege tax for carrying on any occupation that may be classified for taxation, although a pleasing form and pleasant face may have real value in helping a man along in the world. Eloquence is valuable to the advocate yet the court would not tolerate a law which imposed a $20 privilege tax on eloquent barristers and only $10 on

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those not gifted in speech. Such a classification would be arbitrary and unreasonable. It would infringe upon a natural right. But the grant to appellant, we again repeat, is as far removed from legislative power as a natural right.

If the exemption granted to appellant by the legislature be a thing of value it was granted for a consideration. Can the legislature turn upon its own grantee and deprive it either directly or indirectly of anything which passed by the grant? If the grant were a gift, still a good and perfect gift invests the donee with all that is given. The fact that the exemption came from the state, either by a grant for a valuable consideration or by donation, does not and cannot increase the state's power over it, directly or indirectly. The state's power of taxation is not increased by the source whence the right sought to be taxed was acquired.

The language of the statute is peculiar. By the first section of the act (Laws 1898, p. 5) it is provided that "a privilege tax is levied as follows on the following industries carried on in this state, to-wit," which is appropriate for levying privilege taxes, but when we come to sec. 66, "Railroads," there is a departure from the provisions of the first section. It is said (sec. 66) "privilege taxes are levied on them (Railroads) as follows," etc. Railroads are not industries, any more than lumber or corn is an industry. If the pretended privilege tax is a gross sum levied on railroad tracks, engines, cars, etc., the statute is unconstitutional clearly as violative of sec. 112, Constitution of 1890; not only is equality and uniformity violated, but the matter of value is ignored. One of the classifications of railroads, made in the section by the legislature itself, is the "narrow gauge class" evidently referring to the width of track, and the tax is so much per mile of track, thereby showing that the term "railroads" is used throughout the section in the sense of being property. Property cannot be classified for privilege taxes according to the claims or even the rights of its owners, imposing a greater

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tax on the same kinds of property of the same value and put to the same use, because of such claims, or rights without denying to those owners whose property is thus subjected to the greater tax the equal protection of law.

If, however, the privilege taxes specified in the section (66) be upon the persons, corporations or companies owning or operating railroads, or upon the business of operating railroads, the case is not helped; for the act unjustly discriminates against those persons, corporations or companies operating railroads who claim to have, or really have, the right of exemption from supervision and denies them the equal protection of the law. A privilege tax of $15 is levied by the act on each peddler on foot in each county. Suppose the act went further and provided an additional tax of $10 on each peddler on foot in each county who claimed the right to be exempt from jury service, because over sixty years of age. Would not such a classification for taxation be arbitrary and invalid? Would it not be denying the claimant of such exemption the equal protection of the law? It would be a tax upon the exemption. Such an exemption is of value, but it is a mere right given by law. It is neither an occupation nor an industry.

The right of the railroads to claim exemption from supervision is a right given by law; it is not an industry, nor is it, aside from the exemption itself, property within the definitions given of the term by our statute, in force when this suit was begun, Code 1892, §§ 1513, 1514. Is the claim taxable at all?

If the $10 additional privilege tax be on the railroad property it can only be levied equally and uniformly and according to value, constitution, sec. 112; if it be upon the owners of the railroads it is a greater tax than is imposed upon the owners of other like property put to the same use, because of their claim to a right granted them by law, which right is beyond legislative control, and denies them the equal protection of the law. If the additional tax be upon the claim itself,

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it is not only in the nature of a penalty for making the claim but it is a tax on that which is neither property, nor an industry, nor an occupation. You had just as well tax every man who is, or claims to be, left handed.

If the additional tax be upon the exemption, as property, then it is void because not levied according to value. Constitution 1890, sec. 112.

It is manifest that the act of 1898 seeks to impose the taxes upon the property, or the exemption which is property, of the railroad. Suppose after the tax is due under the terms of the act a railroad company should sell all its property, who would be liable for the tax? Would the old company alone be liable or would the new company become the debtor therefor, or would the property remain liable? Read the section (66) and answer. If the property would be liable, then the tax is on the property, and the act is void, since property can only be taxed equally and uniformly and according to value. But if the tax be held to be upon the corporation or railroad company, although called a privilege tax, yet it is a tax on the property of the corporation or company. *Grand Gulf, etc., R. R. Co.* v. *Buck,* 53 Miss., 246, a case in which a privilege tax sought to be levied on the railroad company was held by this court to be within an exemption of "the capital stock of the company and all other property belonging to or connected with said railroad."

We commend to the court specially the language of the supreme court of the United States on the subject of appellant's charter, and in approval of the *Buck case, supra. Gulf & Ship Island Railroad* v. *Hewes,* 183 U. S., par. 4, beginning p. 76, 77, 78.

It is no answer to any part of the argument to say that this court has decided that a right to sell intoxicants is a franchise and is taxable, citing the old Mississippi cases to that effect, as was done by opposing counsel in the court below. There are two sorts of franchises, those which are mere licenses,

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like a license to sell intoxicating liquors, into which no element of contract enters. There are other franchises which have their origin in legislative or charter contracts. Such is the franchise granted to the railroad company under consideration. A contract granting a franchise is within constitutional protection; the obligations of a contract granting a franchise can no more be impaired by the state than any other contract.

The tax sought to be collected in these cases is not laid upon all railroads, and the statute of which it is predicated unjustly discriminates against appellant, depriving it of property without due process of law and denying it the equal protection of the law, contrary to the fourteenth amendment of the constitution of the United States. There is no merit in the contention that the tax is imposed upon a class of railroads, since the pretended classification is unreasonable and void. The following authorities are instructive and applicable to the case, and as we think, conclusive in appellant's favor.

The Tennessee act of 1883 for the regulation of railroads was held to be invalid because by its express terms (sec. 29) it did not apply to any railroad being constructed or which should thereafter be constructed for ten years next following. The discrimination between existing roads and those thereafter to be constructed was held to be unreasonable. *Louisville, etc., R. R. Co.* v. *Railroad Commission of Tennessee,* 19 Fed., 679, 695.

The Florida "Jim Crow Law" enacted in 1905, was held to be violative of the fourteenth amendment of the constitution of the United States because its seventh section specified "that the provisions of the act should not apply to colored nurses having the care of white children or sick white persons." *State* v. *Patterson,* 50 Fla., 127, s.c., 39 South., 398.

In Kentucky the legislature conceived that it would compel a railroad company to pay the entire costs of a fence separating its donated right of way from the lands of adjoining proprietors, although all other partition fences were to be

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paid for jointly by the parties in interest, but the supreme court of that state could find no basis for the exception, and adjudged the statute to be void. *Ohio, etc., R. R. Co.* v. *Todd,* 15 S. W., 56.

The state constitution of California contained a section in terms providing that the value of mortgage liens on lands might be deducted from the value of the land in assessing the same for taxation, but that railroads should not have the benefit of such deduction. The provision was adjudged to be violative of the fourteenth amendment to the United States constitution and consequently void. *County of Santa Clara* v. *Southern Pacific Railway Company,* 18 Fed., 385.

An amendment to the constitution of Missouri, in terms substantially like the section of the California constitution just mentioned, was submitted and adopted, but held void because it did not afford "equal protection of the laws" guaranteed by the fourteenth amendment to the federal constitution, the inequality consisting in the exception as to corporations made therein. *Russell* v. *Croy,* 164 Mo., 69, s.c., 63 S. W., 849.

A Montana statute sought to impose a $25 license tax per quarter on every laundry business, other than a steam laundry, wherein more than one person was employed or engaged, and $15 per quarter upon steam laundries, but it was adjudged void because it denied the equal protection of the laws, contrary to the fourteenth amendment to the federal constitution. *In re Yot Sang,* 75 Fed., 983.

An Illinois statute, defining trusts and conspiracies against trade and declaring contracts illegal which contravene its provisions was adjudged invalid because of an exception from its operation of agricultural products and live stock while in the hands of the producer, since the exception made the statute repugnant to the fourteenth amendment to the federal constitution. *Union Sewer Pipe Co.* v. *Connelly,* 99 Fed., 354.

An Alabama statute was adjudged void which sought to subject laborers and renters to penalties for breach of contract

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not imposed on other classes of persons. *Peonage Cases,* 123 Fed., 671.

A city ordinance prohibiting the sale of clothing on Sunday, all other sales being permitted, was adjudged to be void by the Colorado supreme court on the ground of its being class legislation and prohibited as denying the equal protection of the laws. *City of Denver* v. *Bach,* 46 L. R. A., 848.

An Indiana statute undertook to impose upon municipalities a duty to pay more for a day's labor on public works than the market value of the same, but it was adjudged void as depriving the taxpayers of their property without due process of law. *Street* v. *Varney, etc., Co.,* 61 L. R. A., 154.

A Kansas statute, providing for a fire tax, but excluding the property of a railroad company on which the tax was levied from its benefits, was held violative of the fourteenth amendment of the constitution of the United States. *Atchison, etc., R. Co.* v. *Clark,* 60 Kan., 826, s.c., 47, L. R. A., 77.

An Indiana statute seeking to require merchants and coal miners to redeem in money checks issued in payment of assigned wages was adjudged by the supreme court of that state to be class legislation. *Dixon* v. *Poe,* 60 L. R. A., 308.

This court adjudged an exemption from taxation of a designated class of debts invalid because an unreasonable classification, and although the decision was based on other constitutional provisions yet it could well have been placed upon the fourteenth amendment to the constitution of the United States. *Adams, State Rev. Agent* v. *Kuykendall,* 83 Miss., 571, s.c., 35 South. Rep., 830.

And this court in two recent well considered cases, held a municipal ordinance in one of them and an act of the legislature in the other, each purporting to impose a privilege tax only on persons doing a money lending business securing loans by liens on designated kinds of personal property to be violative of the Constitution 1890, sec. 14 and the fourteenth amendment to the federal constitution, providing that a person shall

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not be deprived of property without due process of law, and the latter further providing that a person shall not be deprived of the equal protection of the laws. The pretended classification was unreasonable. *Rodye* v. *Kelly,* 88 Miss., 209, s.c., 40 South. Rep., 552; *Hyland* v. *Sharp,* 88 Miss., 567, s.c., 41 South. Rep., 264.

We do not of course deny the power of the legislature to classify persons and property for taxation, but the same must be done, if at all, without violating any provision of the state or national constitutions. There must be some reasonable ground for a classification if made; a valid classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, etc., R. R. Co.* v. *Ellis,* 165 U. S., 150.

In a recent very able work, "Limitations of Taxing Power and Public Indebtedness," by Gray, it is said, speaking of classification for privilege taxes, sec. 1432, "In order that the classification shall be legal each class shall have purposes to subserve peculiar to itself, and all of its members local functions to be performed which differentiates them from the members of each and every other class."

Mayes & Longstreet, for appellant, Yazoo & Mississippi Valley Railroad Company.

The exaction of an extraordinary and additional privilege tax beyond that required to be paid by other railroads doing similar business in this state—such exaction being made solely because the defendant enjoys the contract privilege of its charter—is an impairment of the obligation of that charter privilege. It is to extend a privilege to this company by its charter-contract in order to induce the building of the road with one hand, and afterwards, practically, to take it away with the other.

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Brief for appellant.

The terms of the privileges extended in the charter are such that the right of the railroad company to fix its own rates is not without limit. There is a maximum limit. For this reason it is obvious that it cannot be said that if this additional privilege tax is laid on the company because of its enjoyment of this immunity, it can recoup itself by raising the rates. It cannot do so. It might possibly so recoup itself as to compensate for a $10 imposition; but this is a question of principle and not of quantity. If the legislature can lay this imposition to the extent of $10 per mile, it has just as much right to lay it to the extent of $1,000 a mile, or $10,000 per mile. If it can lay an additional privilege tax upon the company not required to be paid by other railroads for the reason solely that the company has the right to regulate its own rates, then it is obvious that it can very easily lay this privilege tax so high (that is to say, so long as there is a maximum limit contained in the charter) as to force the company either to surrender its charter privilege or else actually to lose money by holding onto it.

This act of 1898 was of course passed subsequently to the charter which was granted in 1882, and it is settled that any law subsequent to the contract, directly annulling it, or changing its terms by adding or imposing material conditions, provisions or stipulations, presents a clear case of the direct impairment of the obligation.

15 Am. & Eng. Ency. Law (2d ed.), 1047. The statute imposes a burden on the corporation as a condition or penalty for further exercise of the corporate right which is conferred by its charter. 15 Am. & Eng. Ency. Law (2d ed.), 1049; *Commonwealth* v. *New Bedford Bridge,* 2 Gray, 239; *Bridge Co.* v. *State,* 18 Conn., 53; *Navigation Co.* v. *Coon,* 6 Pa. St., 47.

It cannot be said that there is anything in the taxing power of the state which takes this case from under the operation of these general principles.

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Brief for appellee.

We recognize fully the reluctance felt and frequently expressed by the supreme court of the United States so to apply the constitution of the United States as to impose limitations on the taxing power of the state; but even then it is well settled that the taxing power may be so wrongfully applied as both to impair the obligations of a contract and to deprive of property without due process of law, thereby violating the fourteenth amendment. We suppose it will hardly be necessary to cite authorities to sustain these propositions, but nevertheless, see *Hanford* v. *Davies,* 163 U. S., 273; *Henderson Bridge Co.* v. *Henderson,* 173 U. S., 592, 614 and 618, *et seq.*

Green & Green, for appellee in all the cases.

The contract of appellant, Gulf & Ship Island Railroad Company, contained in sec. 10 of its charter, and the same is true of sec. 6 of the other appellant's charter, provides: "That this company shall have and possess the power of fixing from time to time the rates at which it will do express and telegraph business, and transport other express as may apply for transportation over its lines at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroad or branches," between certain maximum and minimum rates.

By this demurrer appellant admits that every right conferred by the express terms of the contract is now enjoyed to the fullest extent.

In *Stone* v. *Yazoo, etc., R. R. Co.,* 62 Miss., 607, it is declared: "That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear; that this was a valid contract by the state, obligatory and inviolable by it, we regard as settled authoritatively by federal and state decisions too numerous for citations."

The obligation of this contract is inviolate, but this franchise cannot create an exemption from taxation, from bearing

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Brief for appellee.

its just proportion of the public burden, and this because:—

1. There is no power to create an irreparable exemption by a special charter to a special corporation. The constitution of 1869 as construed in the masterly opinion of *Adams* v. *Yazoo, etc., R. R. Co.*, 76 Miss., 545, s.c., 25 South., 366; *Id.* 77 Miss., 194, 24 South., 200, 317; *Id.* 77 Miss., 782; *Id.*, 81 Miss., 90; *Id.*, 180 U. S., 1; *Adams* v. *Tombigbee Mills*, 78 Miss., 676, 29 South., 470, demonstrates (a) that the legislature was without power to grant a special exemption to a special corporation; and (2) an irreparable exemption; (b) and under the facts hold that appellant had lost any exemption created by its charter. These cases are conclusive, because they demonstrate that appellant had no contract for any exemption from taxation, and that it was subject to the taxing power. Contract being made by the legislature which was for this purpose but a special agent of the people, and which by the express terms of the constitution was prohibited from granting exemptions from taxations that were irreparable, or by a special charter, to special corporations, make a contract with appellant whereby a franchise is brought into existence. This franchise is property for, as said by the supreme court of the United States in *Railway Co.* v. *New York*, 199 U. S., 1:

"Indeed growing out of the conditions of modern business, a large proportion of valuable property is to be found in intangible things like franchises. We had occasion to review this subject in *Adams Ex. Co.* v. *Ohio*, 166 U. S., 185, where we said at p. 218:

" 'In the complex civilization of to-day a large proportion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal constitution which restrains a state from taxing at its real value such intangible property. . . . It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It

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is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country' "

In *State Railroad Tax Cases,* 92 U. S., 575, 603, is this language by Mr. Justice MILLER speaking for the court:

"That the franchise, capital stock, business and profits of all corporations are liable to taxation in the place where they do business, and by the state which creates them, admits of no dispute at this day. 'Nothing can be more certain in legal decisions,' says this court in *Society for Savings* v. *Coite,* 6 Wall., 607, 'than that the privileges and franchises of a private corporation and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of a state government.' *State Freight Tax Case,* 15 Wall., 232; *State Tax on Gross Receipts,* 15 Wall., 284."

A privilege tax may be imposed upon a franchise. *Gas Co.* v. *County,* 109 U. S.; *Railroad Co.* v. *New Orleans,* 143 U. S., 195.

In *Kehrer* v. *Stewart,* 197 U. S., 69: "As we have frequently held, the state has a right to classify occupations and to impose different taxes upon different occupations. Such has been constantly the practice of congress under the internal revenue laws. *Coon* v. *Marshall,* 196 U. S., 261, 275. What the necessity is for such tax, and upon what occupations it shall be imposed as well as the amount of the imposition, are all exclusively within the control of the state legislature."

The legislature being without power to create an exemption from the taxing power, and this franchise being property, and being subject to the taxing power, the legislature could not avoid the constitutional prohibition by indirection. The inherent power in the legislature was wanting and to successfully maintain contention of appellant it is a condition prece-

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dent that some party competent to bind the state should have made a contract valid before any constitutional inhibition could be invoked, but under unanimous and repeated decisions of this court, affirmed by the supreme court of the United States, the constitution of 1869 has fixed unalterably the power of taxation, and declared in unmistakable terms that all property is subject to taxation, but not necessarily subjected thereto.

The last utterance directly in point from the supreme court of the United States is the elaborately briefed case wherein Hon. Elihu Root and William B. Guthrie were unsuccessful, and therein Mr. Justice BREWER said (199 U. S., 1):

"The main contention is that this tax legislation impairs the obligation of contracts. It must be borne in mind that presumptively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that any particular property is not so subject as the burden of proof, must make it entirely clear that, by contract or otherwise, the property is beyond its reach. In *Providence Bank* v. *Billings,* 4 Pet., 514, 7. L. Ed., 939, Mr. Chief Justice MARSHALL, in delivering the opinion of the court, said (p. 561, L. Ed. 955):

"That the taxing power is of vital importance, that it is essential to the existence of the government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that a relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

"In *Vicksburg, etc., Ry. Co.* v. *Dennis,* 116 U. S., 665; 29 L. Ed., 770, 6 Sup. Ct. Rep., 625, Mr. Justice Gray cited many authorities, quoting the different phraseology in which, by the several writers of the opinions, the same rule was an-

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nounced. In *Wells* v. *Savannah,* 181 U. S., 531, 45 L. Ed., 986, 21 Sup. Ct. Rep., 697, the law was thus stated by Mr. Justice PECKHAM (p. 539, L. Ed., p. 991, Sup. Ct. Rep., p. 700):

" 'The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment; and the validity of such contract presupposes a good consideration therefor. If the property be, in its nature, taxable, the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties, and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven, and the exemption does not exist.'

"In *Chicago Theological Seminary* v. *Illinois,* 188 U. S., 662, 47 L. Ed., 641, 23 Sup. Ct. Rep., 386, the same justice declared (p. 672, L. Ed., 648, Sup. Ct. Rep., 387):

"The rule is that, in claims for exception from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim." See also *Erie R. R. Co.* v. *Pennsylvania,* 21 Wall., 492; 22 L. Ed., 595; *Wilmington & W. R. R. Co.* v. *Alsbrook,* 146 U. S., 279, 36 L. Ed., 972, 13 Sup. Ct. Rep., 72; *Ford* v. *Delta & Pine Land Co.,* 164 U. S., 662, 41 L. Ed., 590, 17 Sup. Ct. Rep., 230.

"This rule is akin to, if not part of, the broad proposition, now universally accepted, that in grants from the public, nothing passes by implication. As said by Mr. Chief Justice TANEY, in *Charles River Bridge* v. *Warren Bridge,* 11 Pet., 549, 9 L. Ed., 773, 824:

" 'The inquiry, then, is, does the charter contain such a con-

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Brief for appellee.

tract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge or to the diminution of their tolls, or to the line of travel. If a contract on that subject be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public or given to the corporation beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied.'"

No express contract in this provision having been made and it being beyond the power of the legislature so to make a contract none will be implied. *Delaware Tax cases; Railroad Co.* v. *Adams,* 77 Miss., 262, 25 South., 355; Brame & Alexander Digest, 1121. The law never raises by implication a contract which would be contrary not only to the statutes but to the constitution, *i. e.,* a special exemption to a special corporation by virtue of a special charter. There being no contract for exemption from taxation and it being beyond the power of the legislature directly to make such a contract, no such contract will be implied.

Adams case, supra; Bank v. *Billings,* 4 Pet., 559 (opinion by MARSHALL, C. J.); *Gas Co.* v. *County,* 109 U. S. (1883), 400; *New Orleans Co.* v. *New Orleans,* 40 Ann. (1888), 588; s.c. affirmed, 142 U. S. (1891), 195; *Debolt* v. *Trust Co.,* 1 Ohio St. (1853), 573; s.c. affirmed, 16 How., 416; *Railroad Co.* v. *Railroad Co.,* 63 Vt., 21; *Osborne* v. *Nicholson,* 13 Wall., 660; *Bridge Co.* v. *Dix,* 6 How., 536; *Railroad Co.* v. *Pennsylvania,* 163 U. S., 647; *Railroad Co.* v. *Philadelphia,* 101 U. S., 540; *Minot* v. *Railroad Co.,* 17 Fed. Cas., 461; *Railroad Co.* v. *Maryland,* 10 How., 393; *Railroad Co.* v. *Commonwealth,* 10 Bush., 47; *St. Louis* v. *Bank,* 49 Md.,

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574; *Railroad Co.* v. *Maguire,* 49 Mo., 491; *Farrington* v. *Tennessee,* 95 U. S., 689; *Tel. Co.* v. *Harris,* 52 S. W., 748; *Wyandotte* v. *Corrigan,* 35 Kan., 24; *Turnpike cases,* 92 Tenn. 369; *The People* v. *Detroit,* 1 Mich., 458; *People* v. *Commissioners,* 76 N. Y., 77; *Association* v. *Norman,* 98 Ky., 294; *Reed* v. *Beall,* 42 Miss., 472; *Coulson* v. *Harris,* 43 Miss., 738; *Drysdale* v. *Pradat,* 45 Miss., 445; *Portwood* v. *Baskett,* 64 Miss., 216, s.c., 1 South., 105.

There being no contract for exemption from taxation, there is no impairment of the obligation of the contract to fix rates, if the state remains bound and there is no alteration of the clearly expressed terms of the act. The appellant is now fixing its rates, and it is doing everything that these sections of its charter give it the right to do; and with this express contract the state has never attempted to make any alteration, nor to deprive it of one thing which was granted to it thereby. Under the settled law in these cases the legislature was without power to contract away the taxing power, either directly or indirectly, and could pass no act compassing this end, be it a charter or anything else—the charter granting power in the legislature under the constitution did not extend to granting special exemptions from taxation to special corporations by special charters. The state has not atempted to say: "You shall not exercise the power given to fix your rates." On the contrary, it has said: "Continue to fix your rates in accordance with the charter; but as this right is a valuable franchise, for it you must pay a tax for the support of the government, to the end that the same may be effective under its protection." Should the appellant file a bill praying that the court decree the specific performance of the contract evidenced by this section, the state would put in a disclaimer of having interferred with its performance by this act. But for the sake of argument, let us admit that the legislature had this power to exempt from taxation.

No exemption from taxation arises by grant of franchises. This court is asked to decide that a co-ordinate branch of the

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state government has violated its duty to uphold the constitution, and that by this act has attempted to impair the obligation of the contract. As said by Mr. Chief Justice SHARKEY in *Campbell* v. *Bank,* 6 How., 672: "We cannot treat lightly that which the legislature has solemnly determined to be politic and necessary, although it may have become odious." And as further held by Mr. Chief Justice PEYTON in *Newsom* v. *Cock,* 44 Miss., 361: "For it is a wise and salutary rule in regard to judicial construction of constitutional provisions, that in cases of doubt every possible presumption and intendment will be made in favor of the constitutionality of the act in question, and the courts will interfere only in cases of clear and unquestionable violation of the fundamental rules." And as said in Black on Constitutional Law: "The courts will not so construe the law as to make it in conflict with the constitution, but will rather put such an interpretation upon it as will avoid conflict with the constitution and give it the force of law, if it can be done without extravagance. They may disregard the natural and usual import of words used, if it be possible to adopt another constitution, sustaining the statute, which shall not be constrained or fantastic. In so doing, they construe the act in accordance with the presumed intention of the legislature. For the law-making body is always presumed to have acted within the scope of its powers."

Furthermore, the decision of this court upon the question is not that of a court of last resort, unless, perchance, it should declare that the act violated the federal constitution, in which case a writ of error would not lie to the supreme court, but the state would thereby be forever deprived of a portion of its sovereignty by reason of the decision of a court which *quo ad* the question was not the supreme authority.

The words of the federal constitution are: "No state shall pass any law impairing the obligation of a contract"; not the contract, not the value of the contract, not the rights arising under the contract. As defined in *Lessley* v. *Philips,* 49 Miss.,

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801, by Justice SIMRALL: "The obligation of a contract is the duty of performance according to its terms." This is what the state is forbidden to impair. What term of this section has the state attempted to vary? State courts may compel the state by mandatory injunction to observe every right embraced within the section and by it granted, *Stone* v. *Railroad Co.,* 62 Miss., *supra;* the appellant is vouchsafed every right given under the contract and can in no wise complain. In *Ogden* v. *Saunders,* 12 Wheat, 317, it was held: "The learned chief justice, in delivering the opinion of the court in *Sturges* v. *Crowinshield,* after having defined the contract to be 'an agreement wherein the party undertakes to do or not to do, a particular thing' proceeds to define the obligation of the contract in these words: 'The law binds him to perform his engagement, and this is of course the obligation of the contract.' The institutes, Lib. 3, Tit. 4, Cooper's translation, say an obligation 'is a chain of the law by which we are necessarily bound to make some payment according to the law of the land.' Pothier in his treatise concerning obligations, in speaking of the obligation of contracts, calls it *vinculum legis,* the chain of the law. Paley, p. 56, says: To be obliged is to be urged by violent motives, resulting from the command of another.' From these authorities, and many more might be cited, it may be fairly concluded, that the obligation of the contract consists in the power and efficiency of the law, when applied to enforce the performance of the contract, or the payment of the equivalent for nonperformance. The obligation does not involve and subsist in the contract itself, *propiore vigore,* but is the law applicable to the contract. This is the sense I think in which the constitution uses the term obligation."

Again in *McCroken* v. *Haywood,* 2 How., 612, it is held: "The obligation of the contract consists in its binding force on the part of the maker. This depends on the law in existence when it was made; these are necessarily the measure of the obligation to perform them by the one party, and the right ac-

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quired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicates, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce its performance, by the remedies then in force." See also *Curran* v. *State,* 15 How., 319; *Walker* v. *Whitehead,* 16 Wall., 218; *Fitzgerald* v. *Railroad Co.,* 63 Vt., 172; *Bank* v. *Smith,* 7 Ohio St., 53.

The entire extent of the right covered by these two sections was to fix rates; the contract provided that this could be done; but the taxation of the franchise in no wise impaired its obligation. In granting it the power to tax was never relinquished by the state, unless the intention so to do is clear and explicit. The mere contract that the corporation may exercise a certain valuable franchise does not import an exemption from taxation. By such imposition the obligation is untouched, Were the rule otherwise the state could not impose the privilege tax on a corporation which it has chartered, unless the right so to do was expressly reserved in the charter. "Mere silence is the same as the denial of the exemption." *Adams* v. *Railroad Co.,* 77 Miss., 257, s.c., 24 South., 200. The constitution forbade any such grant of exemption from taxation, and the legislature surely could not by indirection accomplish that which it had been forbidden to directly, as held in the *Adams cases.*

Passing these insurmountable obstacles for the time, for argument's sake, we examined the cases where the legislature did have the power to exempt. The earlist case, *Bank* v. *Anthorp,* 12 Mass., 264, Mr. Chief Justice PARKER says, in speaking of a claim of immunity of a corporation, similar to that asserted here: "The object of this charter is to enable them in a body to conduct their business as an individual, to make contracts and to enforce them as such, avoiding the inconvenience of copartnership. It is all that is asked by the company;

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and all that is given by the charter. It is a privilege to manage their business, and not an exemption from duty." Considered in its ultimate analysis, the claim of appellant, as to the impairment of the obligation of the contract by subsequent license taxation, amounts to the startling proposition that after the state has granted its charter authorizing the doing of a certain thing by a corporation where a valuable franchise or property right is created, that thereby by the action of the legislature the state itself, in its sovereign capacity, is forever barred to tax its franchises or property within its jurisdiction, as contrary to the constitutional mandate. The court has interpreted the constitution to mean that the property right under this mandate must be subject to taxation. The legislature under the constitution might create corporations with valuable special franchises, but neither in this, nor in any other way, could they do that which the constitution forbade, *i. e.*, create an exemption from taxation of any corporate property right, and especially, not by a charter to a special corporation. Any absolute contract for exemption from taxation of any corporation property, however it came into being, was contrary to the constitution and prohibited by it. And, moreover, the constitution was so framed that no irrepealable exemption could be granted; and, under the law, the exemption, if granted, was always subject to alteration and repeal. The claim that from under the charter right to do a thing there arose a contract for exemption from taxation by implication as to license taxes thereon, is thus conclusively settled.

Considered in its proper light, the claim of appellant, as to the impairment of the obligation of the contract by subsequent legislation, simply amounts to the claim that after the state has granted a charter to do a certain business, that, thereby the state forever estops itself from taxing that business carried on in pursuance of such charter, because it would impair the obligation of the contract. Such claim is unfounded in reason and

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settled by the opinion of the great chief justice in *Bank* v. *Billings,* 4 Pet., 559, wherein he said:

"In November, 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals, who had associated themselves together for the purpose of forming a banking company. They are incorporated by the names of 'President, Directors and Company of the Providence Bank'; and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

"In 1792, the legislature of Rhode Island passed 'an act imposing a duty on licensed persons and others, and bodies corporate within the state' in which, among other things, it is enacted that there shall be paid for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in. This tax was afterwards augmented to one dollar and twenty-five cents.

"The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration under the acts of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the constitution of the United States, in as much as it impairs the obligation of the contract, created by their charter of incorporation. Judgment for defendants and appeal by plaintiffs.

"And it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state? This question is to be answered by the charter itself.

"It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No

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words have been found in the charter, which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties, and that an assumption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument amounts to this. The charter authorized the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object and would come within the prohibition of the constitution. But, as that cannot be done indirectly which may be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the stock. A power to tax the bank may unquestionably be carried to such an excess as to take all of its profits, and still more than its profits for the use of the state; and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends, not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court in support of these positions.

"The claim of the Providence Bank is certainly of first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

"That the taxing power is of vital importance; that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and

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asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to evidence a partial release of it may not exist; but as the whole community is interested in retaining it unimpaired that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear.

"The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of the legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempt from this duty, as the mere consequence of its charter?

"The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from burdens common to individuals, do not flow necessarily from the charter; but must be expressed in it, or they do not exist.

"If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy that for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction

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of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has, in many, perhaps in all the states, been granted by government since the adoption of the constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And, yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is therefore impliedly relinquished by the grantor though the language of the instrument contains no illusion to the subject.

"If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore, its truth cannot be admitted, in these broad terms in any case. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of individuals may be it is still in the nature of that right, that it must bear a portion of the public burdens; and that portion

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must be determined by the legislature. This vital power may be abused; but the constitution of the United States was not intended to permit the corrective for every abuse of power which may be committed by the state government. The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation as well as against unwise legislation generally."

Under these decisions, what, then, was the state forbidden by the constitution to impair? Not the contract, not the rights under the contract, but only the obligation of the contract. The obligation of the contract is inviolate and only the obligation—so much, but no more, and its obligation has been in no way impaired.

Soon after the charter was granted, March 11, 1884, the legislature passed the act creating the Railroad Commission and vesting in that body the supervision of rates.

In the case of *Gas Company* v. *County*, 109 U. S., the learned Justice MILLER said: "The section of the charter on which plaintiff's counsel mainly rely as showing a contract is the fifth section, which reads as follows: 'Sec. 5. The said company shall have the privilege of erecting, establishing and constructing gas works, and manufacturing and vending gas in the city of Nashville, by means of public works, for a term of fifty years from and after the date of this act. A reasonable price per thousand for gas shall be charged as in the southwestern cities; and for public lights, such sums as may be agreed upon by the company and the public authorities of Nashville; provided, said company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rule in such cases; nor shall they ever charge the corporation of the City of Nashville more per cubic foot than they shall be getting at the said time from the majority of the inhabitants of the city using gas.'

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"But the answer is that the company took their charter subject to the same rights of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of the business, they should have required a provision to that effect in their charter. The constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the state."

This case was quoted at great length with approval in *Railroad Company* v. *New Orleans,* 143 U. S., 195, and the doctrine enunciated above unequivocally declared, and some remarks by way of argument in the prior case of *Gordon* v. *Appeal Tax Court,* 3 How., 133, construable contra, disproved, and overruled, and this case is the only one which we have been able to discover, after careful research, that ever attempted to lend color to appellant's contention.

In *Railroad Co.* v. *New York,* 199 U. S., the court said:—

"It is urged that when the public grants a privilege on condition of the payment of an annual sum the contract implies that the public shall exact no larger amount for that privilege, that to impose a tax is simply increasing the price which the grantee is called upon to pay for the privilege, and *Gordon* v. *Appeal Tax Court* 3 How., 133, 11 L. Ed., 529, is relied upon as authority. It is true, in the opinion of the court, announced by Mr. Justice WAYNE, in this language (p. 145 L. Ed. p. 535):

" 'Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But, why, when bought, as it becomes property, may it not be taxed as land is taxed which has been brought from the state? was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise,

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for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price.' "

"But there was in that case an express exemption from taxation in these words:—

" 'And be it enacted, that, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.' "

"There being thus an express stipulation on the part of a state not to impose any further tax or burden, the question decided was really the extent of the exemption, and it was held to apply, not merely to the franchise, but to the property of the bank. The statements of Mr. Justice WAYNE were only by way of argument to support the conclusion that the exemption went beyond the franchise alone. Furthermore, that case has been repeatedly qualified and limited by subsequent decisions. In *New Orleans, etc., R. R. Co.* v. *New Orleans,* 143 U. S., 192, 36 L. Ed., 121, 12 Sup. Ct. Rep., 406, Mr. Justice GRAY, speaking for the court, said (p. 195, L. Ed., 122, Sup. Ct. Rep., p. 406):

"Exemption from taxation is never to be presumed. The legislature itself cannot be held to have intended to surrender the taxing power, unless its intention to do so has been declared in clear and unmistakable words. *Vicksburg, etc., R. Co.* v. *Dennis,* 116 U. S., 665, 29 L. Ed., 770, 6 Sup. Ct. Rep., 625, and cases cited. Assuming, without deciding, that the City of New Orleans was authorized to exempt the New Orleans City Railroad Company from taxation under general laws of the state, the contract between them affords no evidence of an intention to do so. The franchise to build and run a street railway was as much subject to taxation as any other property. In *Gordon* v. *Appeal Tax Court,* 3 How. (U. S.), 133, 11 L. Ed., 529, the only point decided was that an act of the

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legislature continuing the charter of a bank, upon condition that the corporation should pay certain sums annually for public purposes, and declaring that, upon its accepting and complying with the provisions of the act, the faith of the state was pledged not to impose any further tax or burden upon the corporation during the continuance of the charter, exempted the stockholders from taxation on their stock; and so much of the opinion as might, taken by itself, seem to support this writ of error, has been often explained or disapproved. *Piqua Branch of State Bank* v. *Knoop,* 16 How., 369, 386, 401, 402, 14 L. Ed., 977, 984, 990, 991; *New York* v. *Tax & A. Com'rs,* 4 Wall., 244, 259, 18 L. Ed., 344, 350; *Jefferson Branch Bank* v. *Skelly,* 1 Black, 436, 446, 17 L. Ed., 173, 178; *Farrington* v. *Tennessee,* 95 U. S., 679, 690, 694; 24 L. Ed., 558, 561, 562; *Stone* v. *Farmer's Loan & Trust Company,* 116 U. S., 307, 328, 29 L. Ed. 636, 643, 6 Sup. Ct. Rep., 334, 388, 1191. The case at bar cannot be distinguished from that of *Memphis Gaslight Co.* v. *Taxing Dist.* in which this court upheld a license tax upon a corporation which had acquired by its charter the privilege of erecting gas works and making and selling gas for fifty years; and speaking by Mr. Justice MILLER, said:

"The argument of counsel is that if no express contract against taxation be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter is to destroy that privilege. But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges, and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter. The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state con-

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stitutions and state laws.' 109 U. S., 398, 400, 27 L. Ed., 976, 977, 3 Sup. Ct. Rep., 205, 206."

Murray v. *Charleston,* 96 U. S., 439, is a case appellant relies greatly upon, but there is nothing therein contrary to our contentions, for precisely similar arguments were addressed to the supreme court of the United States in *Railway Co.* v. *New York,* 199 U. S., 42, where that court said:—

"*Murray* v. *Charleston,* 96 U. S., 423, is not in point. The City of Charleston, having issued bonds, subsequently passed an ordinance assessing a tax upon all real and personal property in the city, and directed the treasurer to retain out of the interest due on those bonds the amount of the tax. Murray was a resident of Germany, and resisted the reduction of interest, and it was held that the city could not, by way of a tax, reduce the amount of interest which it had promised to pay to this nonresident holder, the court saying in its opinion (p. 440 L. Ed. p. 671): 'A nonresident creditor cannot be said to be, in virtue of a debt due to him, a holder of property within the city, and the city council was authorized to make assessments only upon the inhabitants of Charleston or those holding taxable property within the same.' "

Furthermore, this case is excellent authority for appellee wherein considering (1) the holder of the "stick" (bonds) was a nonresident of Charleston, so that jurisdiction of both person and thing was wanting; (2) plaintiff could not be sued on the contract after the passage of the ordinance and recover the stipulated amount and that the reason thereof would have been that the obligation was altered by the ordinance in its terms.

Mr. Justice STRONG thus states the case:

"The plaintiff, a resident of Bonn, in Germany, was prior to the first day of January, 1870, and still is, the holder and owner of $25,262.35 of what is called stock of the city of Charleston. The stock is in reality a debt of the city, the evidence of which is certificates, whereby the city promises to pay to the owners thereof the sums of money therein mentioned

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together with six per cent interest payable quarterly. (Italics ours.) One-third of the interest due on the first day of April, July and October, 1870, and January and July, 1871, having been retained by the city, this suit was brought to recover the sums so retained; and the answer to this complaint admitted the retention charged, but attempted to justify it under city ordinances, set out in full in answer to the complaint. By these ordinances, set out in full in the answer, the city appraiser was directed to assess a tax of two cents upon the dollar of the value of all real and personal property in the city of Charleston, for the purpose of meeting the expenses of the city government; and the third section of each ordinance that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon, when the same is due and payable. On these pleadings the case was submitted to the court for trial without jury and the court made a special finding of facts, substantially as set forth in the complaint and averred in the answer, upon which judgment was given for the defendant. The judgment was subsequently affirmed by the supreme court, and the record is now before us, brought here by writ of error."

It will be perceived that the city had promised to pay six per cent interest; that the stockholders could sue on this obligation, and the judgment would be on the obligation of the contract to pay six per cent interest. But suppose the state could break this contract, embodied as to rates in sec. 19, could the plaintiff on the strength of this nineteenth section recover a judgment that the state could not levy a tax on this valuable part of the franchise. We fear that there would be a variance between the contract and the proof, a contract as to rates, proof as to rates, no hint as to exemption that the judgment would go for the defendant.

Argued orally by *R. H. Thompson,* and *Edward Mayes,* for appellants, and by *Garner W. Green,* and *Marcellus Green,* for appellee.

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Opinion of the court.

WHITFIELD, C. J., delivered the opinion of the court.

After the most careful and protracted consideration of this case, we have been driven to the conclusion that the $10 per mile additional privilege tax imposed by the act of 1898 (Laws 1898, p. 8, c. 5), which the reporter will set out in full, is in that respect unconstitutional as impairing the obligation of a contract, and as depriving the appellant of property without due process of law. It was settled in the case of *Stone* v. *Y. & M. V. R. R. Co.*, 62 Miss., 643, 52 Am. Rep., 193, that that railroad had "the unquestionable right from time to time by its board of directors to fix the rates at which it would transport over its railroad, provided those rates should not exceed the maximum prescribed by its charter; that that provision was a contract; that on the faith of that contract capital was invested and the enterprise set on foot, and that it was not allowable for the legislature subsequent to the granting of the charter in 1882 to interfere with the exercise by the railroad of its plainly granted contract rights; that those rights were secure beyond the right of legislation, and could not be impaired." This decision was made construing the very section 6 of the charter of appellant now under consideration, and which section the reporter will set out in full.

There are several things to be noted which we think demonstrate the unconstitutionality of this act in this respect beyond controversy. First. This additional privilege tax is an extraordinary tax, one over and beyond the usual privilege tax required to be paid by other railroads doing similar business in this state. Second. It is clear that the imposition of this privilege tax is an exaction made solely because of the enjoyment by the appellant of this contract privilege in its charter. It was not for the legislature to extend by the charter contract the privilege of regulating its rates within certain limits to this appellant with one hand, and then with the other, after the road had been built, practically take away the privilege by the imposition of this privilege tax. Third. The appellant,

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whilst it has the privilege of fixing its own rates, must do so within limits. There is a maximum limit beyond which it cannot go, and there is no room, therefore, for the argument, if it were worth anything, that the railroad company might recoup itself against this additional privilege tax by raising its rates; for it is perfectly manifest that, if the legislature had the power to lay this additional privilege tax of $10 per mile, it had the power to lay an additional privilege tax of $1,000 per mile, and so it could very easily lay a privilege tax like this (whilst there is a maximum limit contained in the charter at least) so as to compel the company either to surrender its charter privilege or to actually lose money by continuing to enjoy and exercise it. Fourth. This $10 per mile additional privilege tax is a burden imposed on the corporation as a condition to its further exercise of the corporate right conferred by its charter. There are few limitations, indeed, upon the right of the sovereign to exercise the taxing power, one essential to the existence of government; but it is just as certain that if something is denominated a tax, which is in essence not a tax, but a penalty, and which, in its operation, necessarily impairs the obligation of a contract, or deprives of property without due process of law, that something, whatever it may be called, and no matter by what legislation created, cannot stand the test made when its constitutionality is assailed. We are clearly of the opinion that this legislation attempts to create a privilege tax, and not an *ad valorem* tax in any sense of the word. Viewed as a privilege tax, we are constrained to declare that this legislation, in the particular respect indicated, violates both the contract clause of the constitution of the United States and the fourteenth amendment thereof. If, however, the argument made with such exceeding ability and ingenuity, that this is to be treated as an *ad valorem* tax, could prevail, the result would be just as fatal to the appellee. That argument is that this additional $10 per mile alleged privilege tax is constitutional and collectible, for the reason that no discrimination was thereby

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created in privilege taxation, because the basis of the imposition of this privilege tax was this very immunity granted by the charter of the appellant, which immunity, it is urged, was itself an element of value in that it gave to the company power to increase its earnings, that it was itself, in other words, property which was subject to taxation, but, if this view is adopted, such taxation would most manifestly be taxation of property, as property, that is to say, *ad valorem* taxation. We have already held, in the course of this litigation, on demurrer, that the appellant would be liable, if liable at all, for this additional privilege tax, whether the railroad company had ever used or exercised the privilege granted by the charter or not. So that, whether the company availed itself of the privilege to regulate the rates or did not so avail itself, if this so-called privilege tax could be collected at all, its collectibility would not depend, in any sense, upon the fact whether or not the railroad company had availed itself of its said charter privilege. Now the legislature, in this act, has said itself as a matter of law that the existence in the charter, whether availed of or not, of this privilege, is, according to the argument of appellee's counsel, an element of value justifying the imposition of this tax expressly denominated an additional privilege tax. The commission was directed to classify railroads for privilege taxation, under this act, into first, second, and third class, according to gross earnings, and into narrow gauge according to the physical constitution of the road; but, that done, the Railroad Commission did all it was directed to do, except mere clerical work. The legislature itself then declared that this additional tax should be imposed upon each and every class of railroads, whether first, second, or third class, or narrow gauge, if only there was in the charter of such road this clause conferring the privilege of rate regulation within certain limits. In other words, it is perfectly clear that this so-called additional privilege tax is not imposed because of the gross earnings of the company, and not because of any capacity of the company to pay, but solely be-

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cause of the existence of this privilege in its charter, and without reference to whether as a matter of fact this privilege did add anything of value to the property of the railroad or not. Necesasrily such a privilege tax so viewed would be discriminatory, since it is laid solely with reference to the mere existence of this charter right, and that, too, whether it be exercised or not, and whether it is of any financial value or not. It is inescapable that, so viewed, this so-called privilege tax is, in effect, a penalty imposed upon the appellant for the exercise of its contract right granted by its charter and confirmed by this court. But, once more, if we could consider this tax of $10 per mile as an *ad valorem* tax assessed upon the appellant on the theory that the existence of this charter right gives to the appellant an element of property, then manifestly a tax laid upon it as such—that is to say, as property—is an *ad valorem* tax, and not a privilege tax at all. In the revenue chapter, it is expressly provided that there shall be classification and assessment of railroad property for *ad valorem* taxation by the Railroad Commission, and that a valuation of such railroad property shall be made in the light of and with reference to the capacity of the company for gross earnings, both freight and passenger, and also in the light of and with reference to its franchise. If, therefore, this additional $10 per mile, so-called privilege tax, is to be defended on the ground that it is in the nature of a tax on a property value conferred by this privilege in the charter, then it was the duty of the Railroad Commission to consider this privilege as an element of property value in the valuation made by the Railroad Commission for *ad valorem* taxation under the general law; and it is reasonable to presume that the Railroad Commission discharged its duty in this respect as defined by the law, and, if so, then the very element of property value, which it is contended this charter privilege gives the appellant company, must have been taken into consideration by the Commission in fixing the *ad valorem* taxation. Whether, therefore,

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Statement of the case.

this additional $10 per mile is to be treated as a privilege tax or as an *ad valorem* tax, in either case the appellee must fail in its suit.

Wherefore the judgment is reversed and the suit dismissed.

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YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* JOHN W. WALLACE.

[43 South., 469.]

1. CONSTITUTIONAL LAW. *Courts. Supreme court. Original and appellate jurisdiction. New trials. Excessive verdicts. Remittiturs. Code* 1906, § 4910.

Code 1906, § 4910, purporting to deprive the circuit courts of power to grant defendants new trials for excessive verdicts and to authorize the supreme court alone to require remittiturs, is unconstitutional:—

(*a*) It denies a defendant the right to have a complete disposition of his case in a forum provided by the organic law for the administration of justice to all; and

(*b*) It undertakes to confer original jurisdiction on the supreme court to which under the constitution appellate jurisdiction alone belongs.

2. RAILROADS. *Constitution* 1890, *sec.* 193. *Pleadings. Misjoinder of causes of action.*

In a suit against a railroad corporation a common law cause of action for the company's negligence in failing to furnish a safe road bed and machinery cannot be joined in the same count of a declaration with a cause of action arising from the negligence of plaintiff's fellow servants, under Constitution 1890, sec. 193, since they are inconsistent.

FROM the circuit court of Yazoo county.

HON. DAVID M. MILLER, Judge.

Wallace, appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor, defendant appealed to the supreme court.

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Brief for appellant.

The plaintiff, Wallace, while in the discharge of his duty as a brakeman of the defendant railroad company, was riding upon the pilot of a gravel train, the engine of which, in the temporary absence of the engineer, was being operated by the fireman. The engine and train were approaching a railroad crossing which had been recently repaired, and, according to the evidence offered for the plaintiff, raised too high between the rails. Plaintiff, in order to give a signal to the fireman in charge of the engine, undertook to cross from one side of the pilot to the other, stepping upon a small V-shaped stepping board on the side of the pilot. While plaintiff was standing on this board, only four inches wide, the engine reached the crossing, and plaintiff's foot was caught between the foot of the pilot and the road bed and he was thrown under the engine, and severely injured, losing both legs. Plaintiff sued the railroad company for $50,000 because of his injuries, charging that the engine was negligently left in the charge of the fireman, that the road bed was defective, the pilot improperly constructed and the end of the pilot too low; all of which defects were proximate causes of the injury. The defendant's demurrer to the declaration was overruled.

The jury returned a verdict in favor of the plaintiff for the sum of $50,000, the full amount demanded and from a judgment based thereon, the railroad company appealed to the supreme court.

On overruling the defendant's motion for a new trial the presiding judge stated that the verdict of the jury was probably too large to stand, but that under Code 1906, § 4910, the circuit court had no power to interfere with the amount of the verdict.

Mayes & Longstreet; C. L. Sivley, and *C. N. Burch,* for appellant.

We submit, first, that the court erred in overruling the demurrer to the declaration.

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Brief for appellant.

This declaration clearly fell within the rule established by this court in the case of *Railroad Company* v. *Abrams,* 84 Miss., 456, 36 South. Rep., 542, where it was declared that a declaration with but one count, and embracing two wholly independent grounds of liability is indefensible. The declaration here is a long one. An analysis will show that the liability by the whole declaration is placed on various grounds, each independent of the other, and each, if established by the evidence, sufficient to make the company liable without regard to the other; and some of these grounds are of common law obligation, while others derive their force from the constitution and its subsequent legislation.

The declaration, in fact, places the liability, *all in one count,* on the following grounds:

1. Because the road bed, especially at the crossing, was defectively constructed in two different particulars: one being the improper elevation of the surface between the rails, the other being a low joint (and in the *evidence,* plaintiff put the responsibility for this on Maynor, the supervisor).

2. Because of a defective appliance; being the sagging pilot.

3. Because of a defective appliance; being the bad air brake.

4. Because the conductor abandoned his train, leaving it to be run by an incompetent fireman, about whose competency he had not informed himself.

5. Because the engineer abandoned his train, leaving the same to be run by an incompetent fireman.

6. Because the company, acting through its conductor as its representative, put its train into the hands of an incompetent fireman, without informing itself as to his competency.

We, therefore, insist that under the rule expounded in the *Abrams case,* the demurrer to the declaration should have been sustained. The averments of the declaration are to be construed in this connection, most strongly against the plaintiff.

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Brief for appellant.

See *Railway Co.* v. *Burnell,* 36 South, 380, cited and followed in the *Abrams case, supra.*

The court below should have set aside or have reduced the verdict, because it was excessive, and oppressive; and to such an extent as to show prejudice and passion in the jury; the verdict being "for the full amount claimed, $50,000."

The bill of exceptions shows that the presiding judge said that the verdict of the jury was large and doubtless too large to stand, but the said presiding judge considered that under § 4910 of the Code of 1906 he had no power to interfere with the verdict, and overruled the motion for a new trial.

This statement in the bills of exceptions, duly signed by the presiding judge, clearly means that he was prevented from reducing the verdict by sec. 4910. It can mean nothing else.

We are, therefore, confronted by a question of the constitutionality of that section, which takes away from the circuit court the power of ordering a remittitur. We submit that the section violates both sec. 14 and sec. 31 of the Mississippi constitution, also secs. 144 and 156; and also amendment fourteen of the constitution of the United States which forbids any state to deprive any person of property without due process of law.

It will be observed that the prohibition of this section is universal. It says "the circuit court shall not *in any case* have the authority, etc."

It applies to suits on contracts, as well as to actions *ex delicto,* and even to actions for statutory penalties.

It applies to suits for liquidated and fixed amounts, as well as to those for unliquidated damages.

It applies to verdicts rendered, even when there may be no evidence whatever to sustain the amount found, and is not limited to cases in which there is difference in the evidence.

It is one-sided and unequal, since it does not equally prohibit the court from setting aside a verdict because it is too low; thus giving *all* the protection to the plaintiff and none to the defendant.

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Brief for appellee.

It, therefore, plainly invades both the constitutional power of the judiciary and the constitutional rights of the citizen.

It is an invasion of the right of trial by jury.

"'Trial by Jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled to administer oaths to them and to the constable in charge, and to enter judgment and to issue execution on their verdict, but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the facts and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence." *Capital Traction Co.* v. *Hof.*, 174 U. S., 1; *Howe* v. *Raymond*, 74 Conn., 68; *Hodges* v. *Kimball*, 104 Fed., 745, 749; *In re Brenner*, 70 N. Y. Supp., 744, 748, 35 Misc. Rep., 212.

Section 38 of the Bill of Rights, declaring "that the right of a trial by jury as heretofore enjoyed shall remain inviolate," means that all the substantial incidents and consequences which pertain to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law. *State* v. *Winthrow*, 133 Mo., 500; *Arbuckle v. State*, 80 Miss., 15, 31 South., 437.

Cassedy & Cassedy, and *Henry, Barbour & Henry*, for appellee.

[The briefs of counsel for appellee were misplaced or lost from the record before the same reached the reporter, hence no synopsis of either of them is given.]

Argued orally by *C. L. Sivley*, and *Edward Mayes*, for appellant, and by *J. F. Barbour*, and *J. W. Cassedy*, for appellee.

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Opinion of the court.

CALHOON, J., delivered the opinion of the court.

One of the grounds of the motion for a new trial is that the verdict was excessive. In overruling it the circuit court said: "The verdict was large, and doubtless too large to stand; but, under § 4910 of the Code of 1906, it had no power to interfere with the amount of the verdict." This, we think, was very clearly a ruling that that section is constitutional and within the power of legislative enactment. If this be not absolutely true, and we think it is, it must then be certain that the circuit court refused to adjudicate that ground of the motion. In this event the result of our deliberations must be the same, because the people, in the organic law, have given us only appellate powers. We can act only in review of the record presentations of what is done, or not done, or refused to be adjudicated. We can and should reverse in those cases alone where, in our judgment, there is reversible error in what is done, or omitted, or declined to be decided in the court of original jurisdiction.

Section 4910 of the Code of 1906 is this (italics being ours):

"The circuit court shall not *in any case* have the authority to cause the plaintiff to enter a remittitur on pain of suffering a new trial, but if there is *no other error* committed during the trial of any such cause *except* that the verdict is, in the opinion of the court, *excessive,* the court *shall overrule the defendant's* motion for a new trial. But the supreme court may, *where it thinks* the verdict of the jury excessive, reverse the case unless the *appellee* will enter a remittitur in such sum as the supreme court shall direct."

This statute is plainly unconstitutional and void. It is for the benefit of plaintiffs. It shuts out defendants from having complete and final disposition of their rights in a forum provided by the organic law for all, and into which they have been forced by plaintiffs. It compels them to appeal, which otherwise they might not wish to do, and then concludes with a clause, as a salve, by attempting, in the very face of the con-

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stitution, to give the supreme court original, instead of mere appellate, jurisdiction. It works only against the defendant litigant. If the verdict against him be for too much, he must bear the injustice; but note, if it be for too little, the favored plaintiff is not concluded, but may move for new trial. If the jury gave too much, by a miscalculation of the amount due on a promissory note, the defendant must suffer or appeal. He must do this, even if the verdict be without any sort of support in the evidence. No other than the monstrous conclusions above indicated can be drawn from this act. Even in matters of libel, though the constitution itself provides that the "jury shall determine the law and the facts," it was careful to add "under the direction of the court." Such a clause as sec. 4910 would hardly have received a vote in a convention of the people to adopt a constitution. If adopted by such a convention, it would probably be void as in conflict with the constitution of the United States, which forbids the deprivation of property "without due process of law." Our own constitution provides (sec. 31) that "the right of trial by jury shall remain inviolate." When this was adopted, "trial by jury" meant a trial in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it. Twelve men in the woods or on a street corner were not imagined.

The demurrer to the declaration should have been sustained. Antagonistic causes of action should not be allowed in one count. Plaintiffs are not restricted in the number of counts, but may not join in one common-law causes as to unsafe ways and appliances with causes arising from the negligence of fellow servants under sec. 193 of our constitution. They are inconsistent. *I. C. R. R.* v. *Abrams,* 84 Miss., 456, 36 South., 542.

We decide only what we have stated. There are other serious matters, but it is hardly possible they can arise on any other trial.

Reversed and remanded.

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Statement of the case.

WHITFIELD, C. J., delivered the following specially concurring opinion: It was not for the legislature to infringe upon the judicial power vested in the circuit courts. On behalf of the code commissioners who prepared the Mississippi Code of 1906, I desire to say that § 4910 here involved, and § 4811 of the Code, are nonsense written therein by legislative blundering. The commission disclaims any responsibility for their most extraordinary blunders.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *v.* HENRY F. REID.

[43 South., 952.]

APPEALS: *Interlocutory circuit court judgments.* Code 1906, § 4910; *Code* 1906, § 4911.

Code 1906, § 4910, purporting to provide that a circuit court should not grant a new trial because of an excessive verdict but that the supreme court might in such case require a remittitur, and Code 1906, § 4911, purporting to authorize appeals from certain interlocutory judgments of the circuit court, being parts each of the other, and one of them being unconstitutional (see *Yazoo, etc., Co.* v. *Wallace*, the last preceding case in this volume), the other falls with it.

FROM the circuit court of, first district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Reid, the appellee, was plaintiff in the court below; the railroad company, the appellant, was defendant there. Upon the trial of the case in the circuit court a judgment was rendered for defendant, predicated of a peremptory instruction; thereafter the circuit courst sustained the plaintiff's motion for a new trial and the defendant, under Code 1906, § 4911, appealed from the order granting the new trial to the supreme court.

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Opinion of the court.

Mayes & Longstreet, and *C. N. Burch,* for appellants.

O. G. Johnston, for appellee.

Code 1906, § 4911, was a vain and useless thing. It in no wise repealed that section of the code providing that an appeal should only lie from a final judgment. As a matter of fact it was an unwarranted interference upon the part of the legislative department of our government with the judicial department. To quote from the language of this court in a former opinion and to paraphrase a little:—

"It shuts out the plaintiff from having complete and final disposition of their rights in a forum provided by the organic law for all."

In characterizing this sec. 4811, I can do so in no more expressive manner than used by the learned chief justice in rendering his concurring opinion in the case of *Yazoo, etc., R. R. Co.* v. *Wallace, ante* 609, s.c. 43 South., 469, wherein he uses this language:—

"I desire to say that § 4911 here involved and § 4910 of the Code are nonsense written therein by legislative blunder."

CALHOON, J., delivered the opinion of the court.

Appellee brought his action in the court below for damages for personal injuries. The court below granted a peremptory instruction for the railroad company. Then the appellee, plaintiff below, moved the court to set aside the verdict and grant him a new trial, which was done, and the railroad company appeals from the order granting a new trial; the appeal being taken under § 4910 of the Code of 1906.

This appeal must be dismissed, because it is not from a final judgment of the court. Code 1906, § 33. See opinion and concurring opinion in *Y. & M. V. R. R. Co.* v. *Wallace, ante,* s.c., 43 South., 469.

Appeal dismissed.

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Statement of the case.

MAURICE MOSES ET AL. v. FRANK KRAUSS.

[44 South., 162.]

CHANCERY PLEADING AND PRACTICE. *Parties. Partition. Partnership accounting.*

In a suit for partition of lands, formerly belonging to complainant and a third person as partners, and for an accounting of the partnership affairs so that the sum due complainant arising therefrom may be charged upon defendant's interest in the lands, the former partner is a necessary party to the suit, although before suit begun he conveyed his entire interest in the lands to defendants and complainant sold to him all the partnership property except the lands.

FROM the chancery court of Jefferson county.

HON. WILLIAM P. S. VENTRESS, Chancellor.

Krauss, appellee, was complainant in the court below; Moses and others, appellants, were defendants there. From a decree in complainant's favor defendants appealed to the supreme court.

The bill showed that complainant, Krauss, and one Simon were formerly partners and that the copartnership owned the lands in controversy; that at its dissolution complainant sold his interest in all the partnership property except the lands to Simon; that Simon conveyed his one-half interest in the lands to a trustee for the appellants, Maurice and Clara Moses, and the trustee had afterwards conveyed the said half interest to appellants; that whatever rights appellants had to the lands, they acquired the same with full knowledge of complainant's rights; that Simon, complainant's former partner, was indebted to complainant on account of the partnership affairs. The prayer of the bill was for an accounting to ascertain the extent of Simon's indebtedness to complainant and for a partition of the lands, charging the indebtedness on defendant's interest.

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Brief for appellee.

Simon, former partner of complainant, was not made a party to the suit.

Claude Pintard, for appellants.

Complainant's bill is defective, because Simon, a necessary party to the suit, was not joined as a defendant. The issues involved concerned partnership property. Accounting is asked because of the former existence of the partnership. There could certainly be no decree rendered as to any of the partnership matters, which would in any way be binding, unless Simon should be a party to the proceedings. The principle is elementary, that there can be no legal accounting between partners, except by a bill for dissolution of the partnership and an accounting, or a bill for an accounting without prayer for dissolution, and in either case, all partners must be parties to the suit, either as complainants or defendants.

Corban & Easterling, for appellee.

The only question presented in this cause is one of law. The appellants, having failed to introduce any proof in support of their contentions, cannot escape the legal conclusion of facts testified to, and shown by their answer to the cross-bill.

The law of this case we think is well settled. Tiedeman on Real Property, secs. 245, 246; Tiffany on The Modern Law of Real Property, p. 167. Code 1892, § 3101, brought forward as Code 1906, § 3525, gives the court of equity full power to cancel all controverted titles, and to settle all equities in partition suits; and Code 1892, §§ 500, 501, brought forward as Code 1906, §§ 550, 551, gives the court of equity full power to cancel all deeds and encumbrances, and to settle all equities between parties in bills to confirm titles. Hence, the contention of learned counsel for appellants, that in this case it is here improper to enforce the equitable lien of appellee against the undivided one-half interest, formerly belonging to Simon, in the lands, under the alleged claim that

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this is a matter to be adjudicated between appellee and Simon, not a party to this suit, is erroneous. It is a complete answer to such contention to say, that inasmuch as Simon mortgaged to appellants his interest in the lands, and they by foreclosure have become owners of such interest, with full notice of the interest of appellee in the lands, and Simon was thereby divested of all interest therein, appellants took the same, so far as appellee is concerned, subject to the same equities as existed between appellee and Simon before the execution and foreclosure of the deed of trust; and it would have been a misjoinder and error to have made Simon a party to the suit.

WHITFIELD, C. J., delivered the opinion of the court.

Simon was a necessary party to the suit. No decree could have been properly rendered as to the partnership matters, in any view of them, without his being a party.

The decree is reversed, and cause remanded, with leave to both sides to amend their pleadings as they may be advised.

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Brief for appellants.

ALEXANDER M. BARKER v. ELISHA A. JACKSON ET AL.

[44 South., 34.]

1. TAX SALES. *Purchaser. Chancery clerk. Validity.*

The purchase of land at tax sale by a chancery clerk is void, since the performance of official duties for which he is compensated involves acts relating to such sales.

2. SAME. *Statute of limitations. Code* 1880, § 539; *Code* 1892, § 2735.

The three-years statute of limitation has no application to an illegal purchase of lands by the chancery clerk at a tax sale.

FROM the chancery court of, second district, Panola county.

HON. CAREY C. MOODEY, Chancellor.

Barker, appellant, was complainant in the court below; Jackson and others, appellees, were defendants there. From a decree in defendants' favor the complainant appealed to the supreme court.

The purpose of the suit was to cancel the claim of defendants to the land sued for as a cloud upon complainant's title.

The defendants held under a tax title made in 1885 for the taxes of the year 1884, and it was shown that one of the purchasers at the tax sale, under whom defendants claimed, was at the time of the sale the chancery clerk of the county and remained in office for full two years thereafter.

Stone & Wilson, for appellants and cross-appellees.

A party interested cannot take an acknowledgment to a deed. *Wasson* v. *Connor,* 54 Miss., 351; *Holden* v. *Brimage,* 72 Miss., 228, s.c., 18 South, 383; *Jones* v. *Porter,* 59 Miss., 628.

The record shows beyond controversy that Blann was the chancery clerk. We are satisfied this court will hold, in any case, that the chancery clerk cannot acquire the title at a tax sale.

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Brief for appellants.

Blann was the clerk to the board of supervisors, the officer who attended to the making of the assessment roll, the officer who certified the same and the officer before whom the acknowledgment was to be taken, the custodian of the deeds for two years, the redemption officer and the officer who was to value the improvements in many redemption cases. As the redemption officer his functions were judicial.

He could not purchase under the Code of 1880, which was in force when this sale occurred. The chancery clerk's duties in the matter of redemption were governed by secs. 531 and 532. Under it, he determined who was the owner of the land to be redeemed. He taxed the costs, the taxes due since the sale, and the damages accrued. For infant's lands, he valued the improvements. He cancelled the tax deed and noted it on the register, and he determined who was entitled to the redemption money. If the land was not redeemed, he determined who was entitled to the tax conveyance.

With these opportunities before him, if this officer could buy land at tax sales, it would be a determined and intelligent landowner indeed who could redeem his lands sold for taxes when the clerk bought. Many would be the cases where the owner would be compelled to yield to extortion or let the time for redemption pass. It would repay the court to read the case of *Applewhite* v. *Foxworth,* 79 Miss., 773, s.c., 31, South., 533, to see just what kind of fraud would be perpetrated if the chancery clerk be permitted to buy tax titles. The trouble in the most cases would be that the owner could not prove the fraud because the chancery clerk would cover it up. We insist that the clerk's functions in this matter of redemption and acknowledgment are judicial. If his functions are *quasi*-judicial, he can not purchase. See *Wasson* v. *Connor,* 54 Miss., 352.

It has been held that to deposit the deed with the chancery clerk is for the benefit of the owner and is an absolutely necessary step to confer a title, and it must there remain for a year. *Adams* v. *Mills,* 71 Miss., 150, s.c., 14, South., 462.

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Brief for appellants.

How can there be such a deposit with the purchaser? What presumption attends the adverse party's acts and certificate? Can he certify himself a title? Yet such is this case. The code cannot contemplate the chancery clerk's becoming a purchaser. It allows him fees about the entire conveyance. It allows him (no other notarial officer) a fee for taking the acknowledgment to the conveyance. Section 524, Code 1880; Cooley on Taxation, sec. 492; *Coles* v. *Moore,* Ark., 582.

In *McCloud* v. *Burkhalter,* 57 Miss., 66, where a tax collector purchased at his own sale, Justice GEORGE said:

"Besides, persons charged with the administration of the fiscal affairs of the people must be content with the gains provided for in the fees and salaries provided for by law and should not be permitted to augment them by speculations in the funds or property which come under the official control." We plant ourselves on the position that this court will never hold that a chancery clerk, with all his functions about it, can speculate in lands sold at tax sales.

The case of *Brown* v. *Carlisle,* 62 Miss., 595, does not support the view that the chancery clerk can buy a tax title at a tax sale. In that case, a sale of land by the state to a clerk in the auditor's office was upheld, but the court emphasized the facts that the period for redemption had expired, that the title in the state was absolute and that the auditor exercised no discretion in the matter.

If the tax title was not proven or if Blann could not acquire or purchase the tax title, then the three-year statute of limitations does not apply. See *McGehee* v. *Holmes,* 63 Miss., 51; *Pool* v. *Ellis,* 64 Miss., 555, s.c., 1 South., 725.

In all of which cases the court held that where the party who purchased at tax sale could not buy, the three-year statute of limitations never commenced to run. So if the land was not legally purchased the statute does not apply. *Hoskins* v. *R. R. Co.,* 78 Miss., 768, s.c., 29 South, 518.

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The vendees of Blann stood exactly in his attitude. *Jonas* v. *Flannikan,* 69 Miss., 571, 588, s.c., 11 South, 319.

Mayes & Longstreet, for appellees and cross-appellants.

What is the proper effect in this case of the fact that the acknowledgment to the tax deed made by Sheriff Lester in 1885, through which the defendants claim, was taken by the chancery clerk, he being one of the two purchasers?

It would seem that such fact (perhaps?) rendered the acknowledgment void. Such seems to be generally the law in this state. *Holden* v. *Brimage,* 72 Miss., 228, s.c., 18 South., 383. And being void, it is as if it had been recorded without any acknowledgment whatever.

We do not contend that the record of an unacknowledged deed or of a deed the acknowledgment to which is void, will have the effect to impart constructive notice to creditors or subsequent purchasers. The law is too well settled to the contrary. But that question does not arise in this case. The complainant is neither one nor the other. He purchased from Mrs. Dandridge in 1870 and this tax sale took place fifteen years after, in 1885. He himself was the man in default of tax payment which produced the sale.

The failure to acknowledge the tax deed before some other officer than the chancery clerk, who was a beneficiary in the deed, and the consequent invalidity of the acknowledgment itself, does not nullify the deed. It still remains a good deed. Under the common law rule of conveyance the acknowledgment is not an essential part of the deed itself, and is not necessary to the effect of the deed in transferring title. A married woman's acknowledgment under the old rule was so necessary for the simple reason that the statute made it so. But the acknowledgment to a sheriff's tax deed was not by the Code of 1880, under which this sale was made, a necessary part of the deed. See Code 1880, §§ 524 to 532 inclusive.

It will be observed that sec. 525 which was on the subject

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Brief for appellees.

of the "form and effect of conveyances" does not, either expressly or by any sort of implication, require that the deed shall be acknowledged at all; nor is there in any of this legislation any intimation that the deed shall be acknowledged, except that contained in sec. 524. In this section, there is a provision to the effect that "The clerk of the chancery court shall be entitled to twenty-five cents for taking and certifying the acknowledgment of each conveyance," but we submit that this provision does not make such an acknowledgment an indispensable part of the deed.

The theory of the entire legislation is that the tax deed so made by the tax collector shall be deposited as a statutory escrow with the chancery clerk during the period of redemption, and when so deposited and while so on deposit, it has its full effect and operation as a legal and effectual inchoate deed, even although it be not acknowledged at all. See *Edmondson* v. *Granberry,* 73 Miss., 723, s.c., 19 South., 676.

This being true, the provision in sec. 524, that the chancery clerk may have twenty-five cents for taking the acknowledgment has manifest reference, and has reference solely, to the recordable character of the deed after the same passes out of the hands of the chancery clerk, and becomes effectual by its delivery to the purchaser after the period of redemption; and therefore, it looks only to the constitution of such a deed as a recordable paper when delivered to the purchaser, and has no statutory aspect to the inherent character of the deed as being void or otherwise when turned over by the tax collector.

In short it is not a question of the invalidity of the deed even under sec. 524, but is a question merely of the recordable character of the deed after delivery to the purchaser.

So, we repeat that the failure to make valid acknowledgment does not render the deed void; but it only crippled it as to its recordable character. *Ellis* v. *Clark,* 39 Fla., 714; *Langley* v. *Batchelder,* 69 N. H., 566; *Feld* v. *Barber,* 58 Miss., 49.

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Even if it be conceded for the purpose of the argument that the tax title asserted by the defendants below was not available to them for the reasons claimed, still they should have had a decree because they had a good defense and were entitled to such decree through the ten year's statute of limitations.

WHITFIELD, C. J., delivered the opinion of the court.

The deed from the tax collector, made in 1885 for the taxes of 1884, to Chancery Clerk Blann, was void. The chancery clerk could not, in view of his duties in respect to tax conveyances to individuals under Code 1880, §§ 524, 531, 532, become a purchaser at a tax sale. A purchase by a chancery clerk, charged with the duties with which he stood charged under the Code of 1880, is not to be tolerated. It is against public policy and void. The clerk of the chancery court under that code certified the assessment roll, and was the officer before whom the acknowledgment of the tax deed was to be taken. He was the custodian of the deed for two years, the redemption period, and he was the redemption officer, and as such exercised judicial functions. He determined who was the owner of the land to be redeemed. He taxed the costs, the taxes due since the sale, and the damages accruing. He canceled the tax deed, and noted it on the register, and dealt with the redemption money. The deed, whilst it remained on file for the two years, remained on file with him as chancery clerk for the benefit of the owner. The Code allowed him fees in connection with the conveyance. Section 524, Code 1880. In the case of *McLeod* v. *Burkhalter,* 57 Miss., 65, speaking of a deed to a tax collector, the court said, through GEORGE, J.: "Besides, persons charged with the administration of the fiscal affairs of the people must be content with the gains provided for in the fees and salaries provided for by law, and should not be permitted to augment them by speculations in the funds or property which comes under their official control." The principle of this decision applies directly here to a conveyance

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at a tax sale made to the chancery clerk himself. In *Cole* v. *Moore,* 34 Ark., at page 584, the court said, speaking of a tax deed made to the county clerk: "The court below did not err in deciding that appellant, who was county clerk at the time of the tax sale, could not become a purchaser at the tax sale. It was his duty to advertise delinquent lands for sale, to attend the sale, and make a record of the lands and lots sold, the sums bid for them, the names of purchasers, etc., to issue certificates of purchase and certificate of redemption when lands or lots were redeemed, and finally to execute deeds to purchasers on failure of owners to redeem. Having these and other important official duties to discharge, relating to tax sales and designated in the statutes, it is contrary to public policy for him to become a purchaser at such sales"—citing authorities, amongst others, *Chandler* v. *Moulton,* 33 Vt., 247. This is certainly decisive of this point. See, also, as holding the same doctrine, Blackwell on Tax Titles, sec. 297; *Wasson* v. *Connor,* 54 Miss., 351; Cooley on Taxation, sec. 492; *Applewhite* v. *Foxworth,* 79 Miss., 773, 31 South., 533.

Since the chancery clerk could not legally become a purchaser of land at the tax sale, the three-year statute of limitations has no application. *McGee* v. *Holmes,* 63 Miss., 51; *Poole* v. *Ellis,* 64 Miss., 555, 1 South., 725; *Jonas* v. *Flanniken,* 69 Miss., 577, 11 South., 319; *Hoskins* v. *I. C. R. R. Co.,* 78 Miss., 768, 29 South., 518, 84 Am. St. Rep., 644.

The facts in the case do not show any adverse possession, within the meaning of the settled law on that subject, for ten years. The land in this case was susceptible of occupation and cultivation. The facts in this case fall far short of the showing made in *McCaughn* v. *Young,* 85 Miss., 277, 37 South., 839; *Jones* v. *Rogers,* 85 Miss., 802, 38 South., 742, has been expressly overruled in *Kennedy* v. *Saunders* (recently decided) 43 South., 913. See *Lybrook* v. *Hall,* 73 Miss., 517, 19 South., 348, for the true doctrine on this subject.

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Opinion of the court.

It may be added that it appears from the record that this land was assessed to the chancery clerk, and for that reason, also, he could not claim under the sale for taxes. We will not notice the alleged outstanding levee title purporting to have been made by sale by Ozand, tax collector, in 1872, to the levee board, for the levee taxes of 1871. Both counsel for appellant and appellee agree, and correctly agree, in saying that the action of the learned chancellor in basing his decree upon this sale was erroneous, for the reason that it was not set up in the pleadings at all on either side, and was not an issue under the pleadings in the cause.

The decree is affirmed on the cross-appeal, and on the direct appeal it is reversed, and the cause remanded, in order that appellees, if they so desire, may amend their pleadings so as to set up the outstanding levee title referred to, and then, it being in issue, present its validity for consideration.

Reversed and remanded.

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JAMES T. COLEMAN v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

[43 South., 473.]

1. CARRIERS. *Railroads. Passengers. Liability for act of employes. Conductor's right. Self-defense.*

A conductor of a passenger train has a right to defend himself from an attack by a passenger, but he has no right to strike a passenger with a pistol for the use of abusive language to him.

2. SAME. *Bystanders. Injuries.*

If a railroad conductor strike a passenger with a loaded pistol, not in self-defense, but because of the passenger's abusive language, and the weapon be discharged by the blow, the company will be liable for damages resulting from the shot to an innocent bystander, although the shooting be at a station and the bystander not a passenger.

3. SAME. *Instructions. Modification.*

If the trial court modify an instruction which was correct as asked, the party asking it may complain of its erroneous modification on appeal.

FROM the circuit court of, second district, Coahoma county.

HON. SAMUEL C. COOK, Judge.

Coleman, appellant, was plaintiff in the court below; the railroad company, appellee, was defendant there.

From a judgment in defendant's favor, the plaintiff appealed to the supreme court.

The plaintiff sought to recover damages for personal injuries caused by the discharge of a pistol in the hands of Myers, defendant's conductor, who in attempting at a station to eject a drunken and disorderly passenger from a passenger train, struck the disorderly passenger over the head with a pistol, whereby the pistol was discharged, the bullet hitting plaintiff, an innocent bystander, inflicting a severe wound in his shoulder. The passenger, a negro, Strayhorn by name, had been drunk,

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Statement of the case.

unruly and insulting in his conduct on the train before reaching the station; the conductor claimed, and there was evidence to that effect, that at the time of the ejection the negro was disorderly and used insulting and abusive language; that as the conductor approached him to put him off the train he made a motion to draw a pistol from his pocket, and then it was the conductor struck him two or three times with a pistol which was discharged by the blows inflicted with it upon the negro's head. A pistol, nor any other deadly weapon, was not found on the negro when arrested immediately after his ejection from the train.

The plaintiff asked the following instructions which were refused:

"(1) The court instructs the jury that if they believe from the evidence that the negro applied violent and abusive epithets to Myers while he was putting him off the train, and that Myers hit him with a pistol, for using said language, and not in self-defense, then they will find for the plaintiff all damages he has sustained resulting from Myers hitting said negro.

"(2) The court instructs the jury that a conductor in charge of a passenger train has a right to defend himself from attack or wanton insult, but he has no right to strike a passenger over the head with a pistol for insulting him."

The court below modified the following instructions asked by plaintiff, the modification being indicated by italics:

"(3) The court instructs the jury to find for the plaintiff all damages he has sustained, unless they believe from the evidence that, at the time Myers struck the negro with the pistol, he then had reason to believe and did believe his own life was in real or apparent danger, or that he was in real or apparent danger of great bodily harm at the hands of the negro with a deadly weapon, *or that Strayhorn then and there applied to the conductor grossly abusive or insulting epithets.*"

"(5) The court instructs the jury that Myers was acting within the scope of his employment and about his master's

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business at the time the injury complained of by plaintiff was incurred; and unless they believe from the evidence that Myers was acting in necessary self-defense, or was in imminent danger, real or apparent, of bodily harm at the hands of the negro, Strayhorn, with a deadly weapon, then they will find for plaintiff and assess his damages at such sum as shown by the evidence, not to exceed the amount sued for, *unless they further believe from the evidence that Strayhorn applied to said conductor, at the time he struck him, grossly insulting epithets.*"

The court granted the following defendant's instructions:

"(2) The court further instructs the jury that under the law the defendant railway company's conductor had an equal right with other private citizens to defend himself against any unprovoked assault or gross insult; and if the jury believe from the evidence that such assault was made upon him, or that he was so insulted by one Strayhorn, who had theretofore been a passenger on the defendant company's train, and that in repelling said assault the conductor used his pistol, which was discharged accidentally and plaintiff accidentally shot, as complained of by him, then the jury must return a verdict in favor of the defendant railway company.

"(3) The court further instructs the jury that the defendant company's conductor had also the right under the law to resent any gross and wanton insult; and if the jury believe from the evidence that one Strayhorn, who had been a passenger on said defendant company's train, grossly and wantonly insulted said conductor, and that he thereupon then and there resented such insult, using such force as was necessary or proper under the surroundings, circumstances, and conditions, the plaintiff cannot then recover for the alleged injury sustained by him, and the jury must return a verdict in favor of the defendant company."

Brewer & Watkins, for appellant.

It was error in the lower court to refuse the first two in-

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structions, and to modify the third and fifth instructions, asked by the appellant. There was also error in the granting of the second and third instructions asked by the appellee. The lower court evidently acted on the idea that the railroad conductor had a right to strike a passenger with a pistol because of the passenger's use of abusive language toward the conductor. But such is not the law. When and where does the law give to a defendant in a civil cause of action for damages arising out of assault and battery the right to justify himself on the ground that the plaintiff used abusive language toward him? Mere words, no matter how abusive, do not justify an assault. 4 Am. Dig., 873, sec. 10; 3 Cyc., 1077, sec. 8; *Ireland* v. *Elliott,* 5 Iowa, 478; 68 Am. Dec., 715; *Willing* v. *Carpenter,* 15 L. R. A., 853; *Goldsmith* v. *Joy,* 15 Am. St. Rep., 923; *Warner* v. *Talbot,* 60 L. R. A., 336.

Of course abusive language may justify the action of a railroad conductor in removing from the train the passenger guilty of such language, but the removal or ejection must be done in a reasonable manner and without unnecessary force; and under no circumstances does the use of such language justify an assault and battery upon the passenger. *Berkner* v. *Danneburg,* 60 L. R. A. (Ga.), 559; *Berry* v. *State,* 105 Ga., 683.

The words used by the negro passenger, Strayhorn, were about as follows, as shown by the testimony of the conductor, who, being asked the question, "What if anything, did the negro say as he advanced toward you?" answered, "He said, 'You white folks think you are bad, but I'm bad, too.'" The conductor, further, testified that the negro exclaimed to him, "If you or anybody else say I have got a pistol, it is a damn lie." Certainly these words by the negro, Strayhorn, while abusive, gave no right to the conductor to strike the negro, in the absence of necessary self-defense upon the conductor's part. Hence, if in so doing, the conductor's pistol was discharged, and appellant thereby wounded, the railroad company, the conductor's employer, was liable to appellant.

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Brief for appellant.

Harris & Powell, on the same side.

While under our statute law one party may strike another with a pistol for insulting him, yet he cannot either kill or commit an assault and battery with intent to kill, merely because of insulting language. It was with this view of the law in mind, that the first and second instructions were asked by the plaintiff. The conductor, Myers, had no right to use his pistol, merely because of what the negro said, and if he had not made use of his pistol, the plaintiff, an innocent party, would not have been wounded. For the same reason, it was error to modify the third and fifth instructions asked by the plaintiff. *Warner* v. *Talbot,* 66 L. R. A., 336; *Ireland* v. *Elliott,* 5 Iowa, 76; 68 Am. Dec., 1715; *Willing* v. *Carpenter,* 15 L. R. A., 853; *Goldsmith* v. *Joy,* 15 Am. State Rep., 923; 3 Cyc., 1077.

It was also error in the lower court to grant the second and third instructions asked by defendant, inasmuch as the conductor had no right to use his pistol in belaboring the negro, Strayhorn, merely because of the negro's abusive language. It does not follow, as alleged in these two instructions, that if the pistol was discharged, and the plaintiff accidentally shot, while the conductor was thus striking the negro, the jury must hold the defendant not guilty. We submit further, that while the court erroneously told the jury, in these two instructions, that insulting words constituted an excuse for the conductor's assault and battery with intent to kill, the granting of the two instructions was erroneous for the further reason, that the conductor, himself, testified that he did not make the assault because of the insulting language, but for another reason.

We concede, that if the conductor was threatened with a pistol by the negro, Strayhorn, at the time he struck Strayhorn, the defendant would not be liable, but when the court further told the jury that the conductor was justifiable in striking with a deadly weapon, because of mere words used, then these instructions became erroneous.

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Brief for appellee.

It is contended by learned counsel for appellee, that no complaint can be made in this court of the modification of the plaintiff's instructions, because of the fact, that the instructions, as modified, were used in the lower court. If, however, the instructions were correct, as asked, and the modification of the instructions was error, it cannot be contended that plaintiff was estopped from making complaint in this court, because of his use of the instructions in the court below.

Mayes & Longstreet, for appellee.

As the statements of plaintiff and his witnesses tended to make out a case of negligent assault, and the testimony of the conductor and the witnesses for the railroad company made out a clear case of justifiable assault, and the jury passed upon the testimony, the verdict should stand, unless there were such errors of law in the trial, available to plaintiff, as to make it the duty of this court to reverse the judgment. Opposing counsel recognize this, and seek to secure a reversal of this cause wholly on alleged errors in the instructions.

The first and second instructions, asked by plaintiff, did not state the law correctly.

In regard to the modification of the third and fifth instructions for the plaintiff, we submit that the appellant is precluded from assigning the same as error, or making any objections thereto, because of the well known rule of this court, that if a party shall use, at the trial, a modified instruction, such party will not be heard afterwards in the appellate court to complain of the modification. This rule is founded in reason and supported by authority. Instructions are not forced on litigants. The use of any instruction is entirely a matter of choice to the practitioner. When the plaintiff made use of the modified instruction, such action on his part precluded him from assigning the modification as error. *Schraag* v. *R. R. Co.*, 84 Miss., 125, s.c., 36 South., 193.

The same reasoning which makes unavailable to appellant

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Opinion of the court.

as an assignment of error that the court below may have erroneously modified instructions asked for plaintiff, is, from a different view point, the same proposition which precludes the appellant from complaining of any error in the instructions granted to the appellee railroad company, which, as counsel for appellant contended, practically told the jury that the conductor was authorized to shoot any passenger who cursed him. This is the same alleged vice of which appellant complains with respect to the modification of the instructions asked by him. The plaintiff and the defendant in the trial below, both read their instructions to the jury, the supposed rule of law being stated the same way in both sets of instructions. In other words, the plaintiff was granted instructions to the jury to the effect that grossly abusive and insulting words justified the conductor in the assault, and the defendant was granted instructions to the same effect. Both sides having thus voluntarily secured instructions to the jury that the law of the case was a certain way, both sides are now bound by the rule of law just as it is stated in the instructions.

Argued orally by *Robert Powell,* for appellant.

WHITFIELD, C. J., delivered the opinion of the court.

The court below plainly erred in refusing the first and second instructions asked by the plaintiff. It also plainly erred in modifying instruction No. three and instruction No. five asked by the plaintiff, and it also clearly erred in giving instruction No. two and instruction No. three for the defendant. The point made, that the appellant cannot complain of the modification of his instructions, No. three and No. five is not well taken, since the instructions were correct as asked, and the modification was error. *Miss. Central R. Co.* v. *Hardy,* 88 Miss., 732, s.c., 41 South., 505.

Reversed and remanded.

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Statement of the case.

NOXUBEE COUNTY HARDWARE COMPANY v. CITY OF MACON.

[43 South., 304.]

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 109. *Equity. Injunctions. Persons in pari delicto. Municipalities. Contracts. Officers. Purchase of supplies.*

Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply.

2. *Code* 1906, § 3446.

Code 1906, § 3446, touching the subject of municipal contracts, is not retroactive.

FROM the chancery court of Noxubee county.

JAS. F. MCCOOL, Chancellor.

Noxubee County Hardware Company, appellant, was the complainant in the court below; the city of Macon, appellee, was the defendant there. From a decree in defendant's favor, dissolving an injunction and dismissing the bill, the complainant appealed to the supreme court.

The Noxubee County Hardware Company, a mercantile corporation, sued out an injunction against the city of Macon, a municipality, owning and operating its electric light and water works plant, to restrain the municipality from purchasing certain articles of merchandise from one Holberg, the owner of a hardware store, a merchant of Macon, and an alderman of

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Statement of the case.

the city. The bill alleged that partiality was shown by the board of aldermen of the city toward Holberg as against complainant, and that, although different articles could have been purchased from complainant at a cheaper price than from Holberg, the board of aldermen made constant purchases of merchandise necessary for the electric light and water works plant, at much higher prices, from Alderman Holberg; and that the purchases, so made, were in violation of sec. 109 of the state constitution, which is as follows:

"No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state or any district, county, city, or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term."

The bill further alleged that the purchases made by the municipality from Holberg were not only violative of the state constitution, but prevented competition, and by thus shutting out other merchants and not allowing complainant, which had formerly sold this class of merchandise to the city, to enter into competition for the sale of goods needed by the city, the city was forced to pay an excessive price for merchandise so purchased; and the complainant, being a taxpayer of said city, was injured thereby.

The city answered the bill, stating that the merchandise needed by it in its electric light and water plant, were purchased in the open market, and denying that exorbitant rates were paid for such articles, and it is alleged, further, that the superintendent of the electric light and water plant, in charge of the same for the city, purchased such articles of merchandise as were necessary for the plant, without being "authorized by any law passed or order made by the board," but purchased them in open market, and purchased from Holberg for the reason that the articles could be purchased at a rate of fifty

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per cent to one hundred and fifty per cent cheaper than similar articles could have been purchased from the complainant, and for the additional reason, that complainant had refused to credit the city. The answer further averred that the Noxubee County Hardware Company's secretary, one Horton, was also a member of the board of aldermen, and that, therefore, complainant was estopped from bringing this suit. The temporary injunction previously granted was dissolved upon motion of the defendant, and complainant taxed with a solicitor's fee; and from this decree the appeal was taken.

The appellee sought to invoke Code 1906, § 3446, which went into effect after the cause of action arose.

T. W. Brame, and *Miller & Baskin,* for appellant.

The lower court dismissed the complainant's bill on the ground that the law should leave persons in *pari delicto* where it found them, and that, as the secretary of the complainant company, Horton, was a member of the board of aldermen, the complainant was not in a position to bring this suit; complainant being barred under sec. 109 of the state constitution.

We contend that the lower court's view of the law was incorrect. The principle that the law will leave persons in *pari delicto* where it found them, cannot be applied to the extent that an injunction against the purchase by a city from an alderman, in violation of state constitution, sec. 109, will be denied, although the complainant's manager and secretary, an alderman, had made sales to the city; the interest of the public alone being considered. *Houston* v. *Building Association,* 80 Miss., 40, 31 South., 540, 92 Am. St. Rep., 565; *O'Connor* v. *Ward,* 60 Miss., 1037.

Code of 1906, § 3446, can have no restrospective effect, hence can have no application in this case.

George Richardson, and *F. A. Critz,* for appellee.

The facts show that this is a controversy between the owners

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Opinion of the court.

of two hardware mercantile stores in Macon, one owned and conducted by appellant, the other owned and operated by Holberg; that Holberg is a member of the board of aldermen of the city, and that one Horton, another member of the board of aldermen, is also secretary and treasurer and stockholder of the appellant. The sworn answer to appellant's bill states that such goods as were purchased by the city of Macon from Holberg were purchased at a rate of from fifty to one hundred and fifty per cent cheaper than similar goods could have been purchased by the city from appellant.

When a party seeking the intervention of equity has been attempting to secure his ends by means resembling those which he seeks to enjoin, he will be denied the relief. 77 Hun (N. Y.), 215. "He who comes into a court of equity must come with clean hands."

The lower court was correct in dissolving the injunction. There is nothing in the language of sec. 109 of the state constitution to change the general rule, that the law will leave persons in *pari delicto* where it found them.

This case must be affirmed in view of Code of 1906, § 3446, to the effect that "the sale to and purchase by a city of over four thousand inhabitants of any goods, wares, merchandise or supplies, constitutes a purchase within the meaning of this section," the section further reciting that "the provisions of this section shall have no application to villages and towns."

WHITFIELD, C. J., delivered the opinion of the court.

The second ground on which the bill is based, to-wit, that the appellant was affected as a taxpayer, because the charges made by Holberg were grossly exorbitant, etc., utterly fails under the testimony.

The appellee insists, as to the first ground, which is, that Holberg, being a member of the board of aldermen of the town of Macon, is prohibited by sec. 109 of the constitution from making these sales, that Horton, who is a member of the ap-

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pellant company, is also a member of the board of aldermen of the town of Macon, and, to put it shortly, that this is a mere contest between these two merchants, both members of the board of aldermen of the town of Macon, to secure the trade of the town in the hardware business, and that, as the testimony shows that Horton's concern also sold hardware, whilst Horton was a member of the board of aldermen, to the town, the appellant and the appellee are in *pari delicto,* and consequently the principle applies that the law will leave them where it finds them, and refuse to entertain a bill filed by the appellant. There are some things which are so well settled that it is surprising that we should have to restate them. It is utterly immaterial, where the great paramount public policy of the state is involved in the effective administration of the constitutional provision (sec. 109), whether Holberg sold goods cheaper than Horton, or whether either or both were attempting to get a monopoly of the town's trade, or whether either or both acted in good faith in whatever sales they did make, or whether either or both sold the goods at a reasonable and fair price whilst they were aldermen of the said town, or whether both were guilty of fraud and in *parti delicto.* As, for example, in this very case, we are not to be understood as holding that either Holberg or Horton is guilty of any other wrong than the violation of the constitution. Section 109. These questions are all utterly immaterial and wholly out of place, when the effort is here to have enforced a wise and salutary policy of protection for all the people by the constitution in sec. 109. Private interests sink utterly out of sight. The public interest is supreme in controversies like this. These principles are so well settled that a short restatement of them is surely all that can be called for.

The state cares nothing about Holberg or Horton, or their concerns. The state cares everything that the salutary principle of public policy embodied in this sec. 109 shall be faithfully and fearlessly carried out, so as to prevent graft of

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every possible sort, and secure the honest and clean administration of municipal affairs. All this was clearly announced in *Houston* v. *Building Association,* 80 Miss., 40, 31 South., 540, 92 Am. St. Rep., 565, and in *O'Connor* v. *Ward,* 60 Miss., 1037, where we said: "The rule appealed to by the defendant, that when parties are in *pari delicto* the court will lend its aid to neither, is subject to the exception that, where public interest requires its intervention, relief will be granted, though the result may be that the property will be restored to, or a benefit derived by, a plaintiff who is in equal guilt with the defendant. In such cases the guilt of the respective parties is not considered by the court, which looks only to the higher right of the public; the guilty party to whom relief is granted being only the instrument by which the public is served." Many other authorities announcing the same well-settled doctrine are collated in the brief of the learned counsel for appellant.

The town of Macon will come by its proper rights when both these gentlemen resign as aldermen and resume their business as merchants, which, in view of the provision of sec. 109 of the constitution, we have no doubt they will promptly do. It may be that they have acted in actual ignorance of the true construction of this section. They will be without that excuse in the future. In this day of almost universal trouble in municipalities all over these United States in respect to an absolutely fair, clean, and impartial administration of municipal affairs, it is of the very last importance that a constitutional provision like the one here involved shall receive at the hands of this court a construction that will make impossible any maladministration along this line in city affairs. If Holberg and Horton desire to sell their wares to the town of Macon, the way is plain. Let them both resign and resume their business, and then their mutually patriotic desire that their home town shall be protected from monopolistic extortion will be gratified, and the good town of Macon

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get, what it ought to have, the fair sales and just prices which can only be obtained where open competition exists. The contention that the ratification of a contract is not within sec. 109 of the constitution is far too technical. It would destroy the purpose of the section.

It is only necessary to say, in regard to § 3446 of the Code of 1906, that no retrospective effect can be given to that section, and for that reason it has no application in this case. It may be very gravely questioned whether the distinction drawn in that section between cities or towns of over four thousand inhabitants is constitutional, in any event; but we decide nothing as to that in this case, since it is not necessary to decision.

The decree is reversed, injunction reinstated, and the cause remanded, to be proceeded with in accordance with this opinion.

ÆTNA INSURANCE COMPANY *v.* JAMES B. MOUNT.

[44 South., 162.]

1. INSURANCE. *Fire policy. Fireproof safe clause. Evidence.*

A merchant, having a policy of fire insurance on his merchandise conditioned on his keeping books showing the status of his business and requiring him to deposit them in a fireproof safe when the store was not open for business, failed to comply with the policy when he changed his system of bookkeeping, used new books, which brought forward only the footings of the old ones, and did not keep the old books in a fireproof safe, whereby they were destroyed in the fire which burned up the merchandise.

2. SAME. *Waiver. Failure to return unearned premium.*

An insurer, in a policy containing the usual iron safe clause and stipulating that if the policy should become void the unearned portion of the premium should be returned, does not waive a breach of the iron safe clause by failing, after knowledge of the loss, to return or offer to return the unearned portion of the premium; no demand having been made, nor any offer to surrender the policy.

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Statement of the case.

3. SAME. *Pleading. Tender.*

Where in a suit on a fire insurance policy a breach of the fireproof safe clause is a defense, the defendant may, the policy providing for return of the unearned part of the premium when it becomes void, plead the breach and tender the unearned portion of the premium with the plea.

4. SAME. *Several policies. Tender good to some.*

Where an insurer denied liability on several fire policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was good as to that policy on which it was not liable.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Mount, appellee, was plaintiff in the court below; the insurance company, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The plaintiff, a merchant engaged in business in the town of Smithland, in Point Coupe Parish, Louisiana, at which point was located his store building containing a stock of goods and merchandise, took out three policies of fire insurance with the defendant company, as follows: one policy, dated July 1, 1904, numbered 3,694, for $1,000 on his stock of merchandise while contained in the aforesaid building; one policy dated September 11, 1904, numbered 3,786, for $1,750, of which $1,500 covered his stock of merchandise aforesaid, and $250 his store furniture and fixtures and iron safe in the store building; and one policy dated March 5, 1905, numbered 4,050, for $900 jointly on his stock of merchandise and on his store furniture and fixtures. All three policies were of the kind commonly known as the New York Standard form, and were issued and delivered to the plaintiff by the defendant company's agency in Baton Rouge, Louisiana. On May 1, 1905, within the period of insurance stipulated in the policies, the store building and goods and merchandise therein were totally destroyed by fire. The defendant having refused to pay the amounts of the policies, the plaintiff brought this suit to

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Brief for appellant.

recover the amounts stated, aggregating $3,515. In addition to plea of general issue the defendant set up by, special plea, an alleged violation by the plaintiff of the fire proof safe clause of the policies as shown in the opinion. The plaintiff's replication to the special plea was that the defendant failed after the fire and before suit brought to tender back to plaintiff the unearned portion of the premium and was estopped to set up such defense. A demurrer by the defendant to the replication was overruled, and the defendant joined issue on the special plea. Tender of the unearned part of the premium was made by the defendant in court with its pleadings. No demand was made by plaintiff, before suit, for the unearned part of the premiums. The facts as to the pleadings and evidence are further stated in the opinion.

McLaurin, Armistead & Brien, and *Tim E. Cooper,* for appellant.

The two principal questions presented by this appeal are:

First, whether if this insurance had been taken out in the state of Mississippi, on property situated here, the insurance company could rely upon the breach of the iron safe clause, without returning or offering to return the unearned premium. And if this question is answered in the negative;

Second, whether, since this was a Louisiana contract, and since it is held in that state to be unnecessary to return the unearned premium, this court will follow the Louisiana rule and permit the defense to be made here, which might have been made if the policy had been there sued on.

But for the decisions in *Insurance Company* v. *Dobbins,* 81 Miss., one case on p. 623, s.c., 33 South, 504, and the other on p. 630, we would approach the discussion of the first question in the utmost confidence, and could, we think, assert that no case could be found holding that the insurer must return the premium as a condition of avoiding the policy. We concede that the language of the court in those cases suggests that a return of

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the unearned premium is necessary, if the breach of the policy is insisted on; but the question there presented was different from that now before the court in this, that the premiums in those cases were received by the insurance company after the loss had occurred, while the premiums in this case were paid at the time the policies were issued. We will take up the cases referred to by the court in its opinions in 81 Miss., and we shall attempt to show that they are irrelevant to the question here involved, and that in each state from which this court cited decisions, the rule is well settled that a return of the premiums is not required.

The notes of Mr. Freeman to the case of *Wheaton* v. *North British Insurance Co.*, 9 Am. St. Rep., 237, referred to by this court in its opinion, does not refer to the question here involved. The annotator there was dealing not with the question of the construction of the contract of insurance, and whether if a breach was insisted upon, the insurer was required *by the contract* to return the unearned premium. Mr. Freeman was referring to the question of estoppel by the conduct of the insurer after the loss had occurred, by which conduct the insured was invited to, and relying on which conduct he had incurred expense and the trouble of making proofs of loss. Works on insurance and in the decisions as a "waiver," but Mr. Freeman more accurately refers to it as an estoppel against the insurer. It is estoppel known in the books as an "estoppel by misrepresentation." Now, a waiver is a contract, and not only must the minds of the party meet upon it as a contract, but like all other contracts, it must be supported by a consideration, unless being acted on it becomes estoppel. 20 Ency. of Law, 1097; *Ripley* v. *Insurance Co.*, 30 N. Y., 446; *Stewart* v. *Crosby*, 50 Me., 134; *Howie* v. *Insurance Co.*, 32 Conn., 21. Mr. Bigelow's definition of an estoppel by misrepresentation is this:

"By misrepresentation is meant a false impression of some fact or set of facts created upon the mind of one person by

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another, by language, or by language and conduct together, or conduct alone equivalent to language, where there appears to be no intention to warrant the same." If after loss has occurred under a policy which has been breached by the insured, by which breach the policy is forfeited, the insurer is then for the first time informed of the fact, he may stand upon the forfeiture according to the terms of the contract; but if he does not do this, but so conducts himself as to warrant the insured in believing that the forfeiture will not be insisted upon, and the insured relying on such representations, is induced to, and does, incur expense and trouble, this changed condition of the insured furnishes the consideration for the waiver and results in estoppel. Now, it is apparent that when, as in this case, the insurer does nothing to lead the insured to change his position, and there is no change in his condition, the doctrine of estoppel, or waiver, can have no application. The right of the insured in such case to recover must exist, if at all, by the contract of insurance, and not from the waiver by the insurer, acted on by the insured and resulting in estoppel. We do not think this proposition was intended to be controverted by anything said by this court in the *Dobbins cases, supra.* In those cases, the position of the assured was changed after the loss had occurred. We do not think it is necessary to further consider so much of the opinion of the court as refers to Mr. Freeman's notes to the case of *Wheaton* v. *Ins. Co.,* 18 Pac. Rep., 758.

Taking up the cases referred to by this court, and which relate directly to the question whether it is incumbent on the insurer to return the unearned premium, as a condition of relying upon the forfeiture for breach of the contract of insurance, we will examine first the case of *Schreiber* v. *German-American Hail Ins. Co.,* 43 Minn., 368. In that case, the insured had given notes in a mutual company for the premiums on the policies, and after the loss, the insurance company sued upon the notes and enforced their payment. The Minnesota

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court expressly put its opinion upon the ground that this was an assertion of the validity of the policy. The quotation from that opinion by this court ends just where the supreme court of Minnesota came to consider the precise question involved in the case now before the court. It is to be here observed that the policy in the Minnesota case was breached by taking out additional insurance, and that the company had notice of that insurance before the loss, and did not cancel its policy, but after the loss, coerced payment of notes given by the insured. But immediately following that part of the opinion of the Minnesota court, quoted by this court in the *Dobbins case,* the Minnesota court proceeded as follows: "We find no case exactly like this. There are some which seem to intimate that before electing to avoid wholly the policy, the insurer must return the premium even voluntarily paid. *Fishback* v. *Ins. Co.,* 54 Cal., 422; *Harris* v. *Equitable Life Ins. Co.,* 644 New York, 196; *Home Ins. Co.* v. *Riel* (Pa.), 17 Atl. Rep., 36. Without expressing any opinion of what is said in those cases, we do not hesitate to hold in this case, that the defendant could not retain the premiums thus collected, and also avoid the policy; that under the circumstances, it was the defendant's duty, as soon as it learned of the breach of the condition, to determine whether it would abide by the policy and retain the premiums, or restore them and elect to avoid it. It has never returned nor offered to return the premiums, and by retaining them must be deemed to have elected to abide by the policy." Of the cases referred to by the Minnesota court, it is sufficient to say, that in the New York case the objection was fraud in procuring the reinstatement of a lapsed policy, by reason of which the reinstatement never attached. It is further to be observed, that the recovery in that case was not for the amount of the policy, but only for the premiums paid.

In the case of *Home Life Ins. Co.* v. *Riel,* 17 Atl. Rep., 36, the defense was that the application for the insurance was not signed by the beneficiary. But she had paid the premiums for

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several years, and thus ratified the signature to the application, by whomsoever made. In the California case of *Fishback* v. *Ins. Co.,* 54 Cal., 422, the defense was prior insurance, by reason of which the insurance sued upon never attached. But the agent had notice of it at the time he issued the policy, and so it was held that issuing the policy with that notice, waived the prior insurance. Again, it appeared that after the loss, the adjuster, with full notice, misled the insured into believing that the company would pay its part of the loss, by reason of which he settled with other companies for their proportionate part, and the company was held to be estopped by this. The opinion contains not a single citation of authority, and only a few lines in reference to the return of the premium. The citation of the *Schreiber case* by this court would range the Minnesota court in the favor of rule that the unearned premiums must be returned. But as appears from the cases cited above the Minnesota court has declined to so hold. See also *Johnson* v. *American Ins. Co.,* 41 Minn., 399.

We come now to the case of *Johnson* v. *The Southern Mutual Life Ins. Co.,* 79 Ky., 406, cited by this court. The company there had issued a policy which contained a stipulation that failure to pay premiums should avoid the policy, but that if as much as three years' premium be paid, then, notwithstanding the forfeiture, a new paid-up policy would be issued, upon demand, within thirty days after the forfeiture, for the equitable value of the original policy. Johnson, the insured, had paid five years' premiums of $129.88 each. A premium fell due October 21, 1875, and he paid in cash, $22.88, and gave his note for $107, due ninety days after date. The cash paid, and the note, would have carried the policy to October 21, 1876. Soon after the maturity of the note, the company without returning the note, gave notice that the policy was forfeited, but it continuously thereafter claimed to own the note, which, as we have said, would have carried the policy until

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October 21, 1876. The company was then claiming the note, which represented the whole year's premium, and in the meantime, asserting a right to forfeit the policy before the end of the year. It is to be observed, however, that all that was involved in that case was the right to a paid-up policy, according to the value of the old policy, measured by the premiums which had been paid on it, and the only relief obtained was for this paid-up policy.

In the case of *Phœnix Ins. Co.* v. *Stevenson,* 78 Ky., 150, the precise question now under consideration was involved. In that case the insurer issued to the insured a policy of insurance upon his house for $3,000, providing in the policy that if he insured his house in any other company without the consent of the insurance company, the policy was to be void. He did insure his house in other companies, without the consent of the insurance company, and the house was burned. It was there held that it was not the duty of the company, after being informed of the additional insurance and the burning, to return the premium for the time the policy had to run, from the burning to the expiration of the policy. See also May on Insurance, 505, 507; Flanders on Fire Insurance, 170.

The court also refers to the case of *Phœnix Ins. Co.* v. *Tomlinson,* 125 Ind., 84. In that case the insured had given a note for the premium and the policy contained a provision that in case the assured failed to pay the premium note at the time specified, the policy should not be in force and should remain null and void during the time said note remained unpaid after its maturity, and no action on the part of the company to enforce payment should be construed as reviving the policy, the payment of the premium after reviving the policy making it good for the balance of the term. The policy also contained another provision, that in case of loss any note due by the assured should be deducted from the insurance. The note was not paid by the assured and while it was unpaid the property was destroyed. After the loss the company with full knowl-

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edge received payment of the note. The court in considering the policy held that, since it could not be assumed that the assured was paying the note on a policy, which could not be enforced, and the company must have so understood that this was a waiver, and drew a distinction between that and another case in which a note had been given and after its maturity the loss occurred, and the note was never paid. It is, however, well settled in Indiana, that when a policy becomes void by reason of the act of the assured, he is not entitled to receive back any part of the premium. *Ins. Co.* v. *Houser,* 111 Ind., 266; *Ins. Co.* v. *Daubenspiel,* 115 Ind., 306. See also *Millers Manufacturing Ins. Co.* v. *Parsons et al.,* 106 North Western, 485, reported also in Lawyers R. A., vol. 4, New Series, p. 231; *Georgia Home Ins. Co.* v. *Rosenfield,* 37 C. C. A., 96; *Austin* v. *Mutual Reserve Fund Life Ass'n,* 132 Fed., 555; *Houdeck* v. *Merchants' & B. Ins. Co.,* 102 Iowa, 303, 71 N. W., 354.

As noted in *Taylor* v. *Grand Lodge A. O. U. W.,* 105 N. W., 408, the case of *Schreiber* v. *German-American Hail Ins. Co.,* 43 Minn., 367, 45 N. W., 708, is not an authority for the rule that the mere retention of the premium paid before notice of a breach of condition is conclusive evidence of an election to treat the policy as valid. Neither do the cases incidentally referred to by Chief Justice GILFILLAN in that case sustain this proposition. In *Fishbeck* v. *Phenix Ins. Co.,* 54 Cal., 422, there was present every element of a technical estoppel. The point is not decided in *Harris* v. *Equitable Life Assurance Soc.,* 64 N. Y., 196. In *Baker* v. *New York Life Ins. Co.,* 77 Fed., 550, it appeared that the insurance company for a full year after knowledge of all the facts treated the policy as in force. *Jones* v. *Ins. Co. of N. A.,* 90 Tenn., 604, 25 Am. St. Rep., 706, 18 S. W., 260, was an action by the insured to recover the premiums. See comment upon these cases, and *Home Mut. Life Ass'n* v. *Riel,* 1 Monaghan (Pa.), 615, 17 Atl., 36; *Georgia Home Ins. Co.* v. *Rosenfield,* 37 C. C. A., 96, 95 Fed., 358, 361. In some states statutes have been en-

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acted which require an insurance company to return all premiums which it has received, as a condition precedent to interposing a defense on the ground that the policy was obtained by misrepresentations. Mo. Rev. Stat., 1879, sec. 5977; *New York Life Ins. Co.* v. *Fletcher,* 117 U. S., 519, 29 L. Ed., 934, 6 Sup. Ct. Rep., 837; Cal. Civ. Code, § 2617; and Va. Acts 1897, 1898, ch. 601, p. (Va. Code 1904, p. 638); *Virginia F. & M. Ins. Co.* v. *Cummings* (Texas Civ. App.), 78 S. W., 716; and *Metropolitan L. Ins. Co.* v. *Moore,* 117 Ky., 651, 79 S. W., 219, sustain the appellant's contention; but they rest upon what seems to us an erroneous theory. The rule there applied would be properly applicable in an action by an insurance company against the insured for the purpose of having the contract rescinded.

Neither is appellant's contention sustained by *Mississippi Home Ins. Co.* v. *Dobbins,* 81 Miss., 623, 33 South., 504. In that case the premium was paid after the agent of the company had notice of the loss; and after the notice of additional insurance the company furnished blanks and allowed the insured to make proofs of loss. It was held that, under the circumstances and under the terms of the policy with reference to the return of premiums upon cancellation of the policy, the company was estopped by its failure to return the unearned premium. *Commercial Assur. Co.* v. *New Jersey Rubber Co.,* 61 N. J. Eq., 446, 49 Atl., 155, was a suit by the insurer to cancel the policy.

In this case the insurer is not asking to have the contract rescinded. The premium came into its possession lawfully under color of what was assumed to be a valid contract, and it cannot be properly placed in a position of withholding it until payment has been demanded. *American Mut. L. Ins. Co.* v. *Bertram,* 163 Ind., 51, 64 L. R. A., 935, 70 N. E., 258.

We submit that the words, "become void or ceased," in the policy do not cover cases in which the policy is avoided by a breach on the part of the assured. There are many things

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named in the policy wholly beyond the control of the assured upon the happenings of which the policy becomes void or ceases, *i. e.*, "a change in the interest, title or ownership of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the assured or otherwise, or if with knowledge of the assured foreclosure proceedings be commenced, or notice given of the sale of any property covered by the policy, by virtue of any deed of trust or mortgage, or if any building, or any part thereof, fall, except as the result of fire." "When by reason of any of these things the policy becomes void or ceases, it is but just that the unearned premium be returned, for the assured does not by his own act bring about such conditions. But there is no reason, in law or morals, why any part of the premium should be returned when the policy is rendered void by the voluntary act of the assured. Such construction would carry the right to a return of a part of the premium even in the case specified in the policy of "false swearing by the assured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss." *Colby* v. *Ins. Co.*, 66 Iowa, 577. Such provisions are self-executing provisions. *Barry* v. *Order of Catholic Knights*, 119 Wis., 362. *Perry* v. *Ins. Co.*, 132 N. C., 283.

The iron safe clause is declared a reasonable one by the courts. But whether it be or not, it is one the parties have agreed on. It is part of the standard New York policy, and the appellant was required by the statute law of Louisiana to use that form in all of its contracts made in that state. It was one of the terms of the contract, and one of the conditions on which the insurer agreed to be bound. The assured agreed to porform its stipulations, and in event of failing so to do, that the policy as a contract of insurance should end. If it be held by the court, that notwithstanding the voluntary breach of the contract by the assured, he was under the circumstances entitled to a return of any part of the premium, he

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must, surely, at least bring himself within the conditions upon which such return could be claimed.

We have thus far argued this case as though the contract had been made in this state, and as if this court would adopt its own view of the construction of the policy, uninfluenced by the decisions of any particular state.

We come now to look at the question from a consideration of the policies as Louisiana contracts. The contracts were not only Louisiana contracts, made in Louisiana, insuring property situated there, to be fully performed there, but they were contracts made under the operation and control of the statutes of that state, which statutes entered into these contracts as though they were written into the policies. Whatever constructions, therefore, have been put upon such policies by the courts of that state, it is submitted are of controlling influence, and especially if they were made before these policies were written.

It seems that the supreme court of Louisiana has not had presented to it the precise question which controls in this case. But the appellate court of that state has expressly ruled upon the question in an opinion delivered by Judge PUGH in the case of *William Harper* v. *American Fire Ins. Co.*, as yet unreported. It is in that case expressly held that no return of the unearned premium is required to enable the insurer to rely upon the forfeiture.

The statute of Louisiana under the operation of which the policies sued on were written, was enacted in 1898, and it prohibits fire insurance companies doing business in that state from issuing "policies on property in this state other than those which shall conform to the requirements of the New York standard form of fire insurance policies." Act No. 105, p. 151, 1898, sec. 22. The power of the legislature to enact such a statute is undoubted. But it is so essentially an exercise of legislative power, that it cannot be delegated. *Dowling* v. *Lancashire Co.*, 92 Wis., 63, 31 L. R. A., 112. To the

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same effect are: *Anderson* v. *Manchester Fire Ins. Co.*, 59 Minn., 182, 28 L. R. A., 609; *Oneil* v. *Am. Fire Ins. Co.*, 166 Pa. St., 72, 26 L. R. A., 715. We have then a contract entered into between the parties; but its form, substance and meaning, depending, not upon what the parties intended, but upon what the legislature intended by the statute it enacted.

To say that a contract made in Louisiana under this statute, is to be construed under general laws applicable to agreements made by parties permitted to contract as they may choose, and that the courts of any one of the states in which a suit may be brought, can substitute their judgments, for that of those of the state in which the contract is made, would be to produce incalculable confusion. The assured who has the choice of the forum, would, when he had determined to sue, begin to inquire, not what the courts of the *loci contractus* had or would decide; but what court had by its opinions evidenced views more favorable to him. Because, as we may assume that the appellee realized that he could not recover in a suit brought on these policies in Louisiana, where the contracts were made, he has come into this state, hoping to leave behind him the statutes under which the contracts were made, and the decisions of the courts of that state construing such policies. If the decisions of the courts of this state had in his opinion, not been favorable to the contentions he makes, and those of Arkansas or Missouri, of Washington or of Maine, had promised success, he would have elected to sue in that state and not in this. But this court will not ignore the Louisiana statute. *Shaw* v. *Postal Tel. Co.*, 79 Miss., 670, s.c., 31 South., 222. Every stipulation and provision of the policy is controlled and imposed by the Louisiana statute.

The supreme court of Louisiana has uniformly held that a breach of the iron safe clause renders the policy void. 48 Ann., 223; 36 Am., 660; 41 Ann., 31; 52 Ann., 775.

The authorities are divided upon the question whether in a policy which insures property to which the iron safe clause

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is applicable, and also other property, which by reason of its nature is not controlled thereby (as fixtures or a building), and the policy provides that a breach of the clause shall render the insurance void, the stipulation is divisible, or indivisible. In this state it is held that the insurance is divisible, and that a breach of the iron safe clause avoids the policy only as to the property to which it is applicable. *Insurance Co.* v. *The Bank,* 71 Mass., 608, s.c., 15, South, 392; *Mitchell* v. *Ins. Co.,* 72 Miss., 53, s.c., 18 South., 86.

But the supreme court of Louisiana takes the other view, and holds that a breach of the clause avoids the policy *in toto. St. Landry Co.* v. *Ins. Co.,* 38 South. Rep., 87.

The question is not one of procedure, and therefore to be governed by the law of the forum, but it is one going to the substance and meaning of the contract, and is of course controlled by the *lex loci contractus.*

J. Lemkowitz, Alexander & Alexander, and *George B. Power,* for appellee.

In behalf of appellee, our propositions are as follows:

1st. This case falls squarely within *Mississippi Fire Association* v. *Dobbins,* 81 Miss., 630, 33 South., 504, and the failure to return or tender the unearned premium before suit brought must be treated as violation of the express provision of the policy and a waiver of the forfeiture if there had been a forfeiture.

2d. No question of a Louisiana statute or of a Louisiana law is involved. Louisiana has no statute relative to the duty of tendering back the premium, nor has the question here presented been decided by the supreme court of Louisiana. Even if that court had construed it, this court, on the general law, such as waiver or estoppel, or the construction of a private contract, will be controlled by its own views of what is a proper construction.

3d. If the court should overrule *Mississippi Fire Associa-*

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tion v. *Dobbins,* or should hold for any reason that the tender was unnecessary, we still say that there was a substantial compliance with the iron safe clause.

4th. There has never yet been a lawful tender. The payment into court was too late and was in full satisfaction of all the policies. In fact, one of the policies covered a loss on fixtures and to this the iron safe clause has no reference; and one of the policies in the Ætna, viz., for $900, was not issued until March 5, 1905, and the only irregularity complained of in the books was prior to January 1, 1905. The agreement as to the keeping of books was prospective, and after the issuance of this policy it is not even claimed that there was any failure of duty. Yet the tender was on condition of surrendering all of the policies, including this policy and the policy covering the fixtures.

1. The cases discussed in appellant's brief do not involve the clause in question which is contained in the New York standard form of policies, but they go off on questions as to what acts on the part of the insured amount to an estoppel or waiver under the general law. These cases might be pertinent if the question presented were whether the facts in this case bring it within *Mississippi Home Insurance Company* v. *Dobbins* instead of *Mississippi Fire Association* v. *Dobbins.* Those two cases were considered together by this court, and decided together. In the former case, the court commented on the inapplicablity of the argument which proceeded upon the assumption that the case presented nothing more than a mere retention of the premium by the company. Waiving that question, the court held that the company was estopped to set up the forfeiture because of the acts of the agent after fire, and after he knew of the loss, the failure promptly to disavow liability under the circumstances amounting to an estoppel. The natural result of the agent's silence and non-action was that Dobbins had to proceed on the idea that the proofs of loss were necessary and he was put to the trouble of making the

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Brief for appellee.

proofs of loss, and the court held with the Kentucky court and other courts that when the insurer learned of the forfeiture, even where there was no agreement in respect to the return of the premium, it was bound to either assent or cancel, and failing to do either it will be treated as having assented. On the other hand, in the case of *Mississippi Fire Association* v. *Dobbins* case, the court, confronted by the standard policy found that the duty of the company on learning of the breach not only arose under the general law and as a matter of honesty and fairness, but arose under a special provision of the contract to the effect that if the policy should become void the unearned portion of the premium should be returned. It is true that in the latter case the evidence left it uncertain whether the agent collected the premium from Dobbins after the fire and after he knew of the other insurance. Had the evidence on this point been certain, the court might well have put its decision on the ground that acceptance of the premium after knowledge of the breach was itself a waiver; but, the court did not rest its decision on that point. It could not well have done so, because there was no instruction touching the question and the case was tried without a jury. However that may be, this court disposes of the case by citing the express provision of the contract and declaring, "that the appellant, instead of conforming to the terms of the contract, says the policy is void and yet holds on to all of the premiums."

While the pleadings presented squarely the question decided in *Mississippi Fire Association* v. *Dobbins,* yet under the general traverses testimony was taken and what transpired after the loss was shown, and we submit confidently that under that evidence the peremptory instruction was proper, even if *Mississippi Fire Association* v. *Dobbins* had not been decided, for the facts bring the case within *Mississippi Home Insurance Company* v. *Dobbins.*

It will be seen that most of the cases reviewed by appellants in their brief were those in which the knowledge of the breach

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was received by the agent or the company before the fire, and we readily concede that most of the cases cited can be differentiated on the facts from both the *Dobbins cases* in that respect; but, we deny that there is any essential difference of principle involved where the knowledge of the breach comes before the fire and where it received afterwards during the adjustment. There may be a stronger reason for applying the rule where the knowledge is acquired before the fire, but the principle invoked to sustain the waiver is the same in both instances.

It is very generally held that, although policies of insurance prescribe that upon certain breaches of conditions the policy shall be void, they become merely voidable; our courts have time and again recognized this rule, and, in *Mississippi Home Insurance Company* v. *Dobbins,* cites with approval the Minnesota decision which held, that the breach of the condition did not make the policies absolutely void, but that they were void only at the *election* of the defendant which might waive the breach of the condition.

In 3 Cooley, Briefs on Insurance, p. 2690 (d), that author after discussing the rule which was sanctioned in *Mississippi Home Insurance Company* v. *Dobbins,* proceeds to the proposition involving the mere retention after loss with the knowledge of the breach, says: "Some cases hold that the retention after loss with knowledge then first obtained of a forfeiture or avoidance of a premium or assessment unearned at the time of such forfeiture or avoidance, may operate as a waiver of the defense the same as though the money had been originally accepted with such knowledge." The author cites many cases, among others *Schreiber* v. *German American Hail Insurance Co.,* 43 Minn., 367, which our court cited in *Mississippi Fire Association* v. *Dobbins.* This author, Cooley, then proceeds to state as follows: "Other cases proceed on the line that the rights of the parties are fixed by the loss and if insured was not entitled to recover, then mere retention of the premium does not

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Brief for appellee.

give the right," citing a case in Iowa and North Dakota and two decisions of inferior courts elsewhere.

Very many of the cases cited by appellant are those in which the inquiry of the court was whether there was an intentional concealment of a defense or whether the insured was misled and prejudiced. We have shown however that *Mississippi Fire Association* v. *Dobbins* was not decided solely on the doctrine of estoppel, but on waiver based on nonperformance by the company of an expressed stipulation; but, even where no such stipulation is involved the best considered cases now put the denial of the right to avail of the forfeiture on broader grounds.

Counsel for appellants proceeding on the erroneous postulate that this case is controlled by the first case of *Mississippi Home Insurance Company* v. *Dobbins* review and attempt to distinguish all of the cases referred to in the opinion in that case. They seem to forget that that case might be ignored or conceded to be erroneous, and yet this case fall squarely within *Mississippi Fire Association* v. *Dobbins;* but both cases are right in principle and on authority. Notwithstanding the numerous cases cited by appellant, we state with confidence that not one of them is an authority for the proposition that under a standard policy containing the clause in question in this case the company after knowledge of the breach can refuse to perform the obligation imposed on it by withholding the premium, and not insist on the forfeiture.

2. On our next proposition, as there is no question of conflict of laws involved, little need be said. Counsel for appellant must concede that the supreme court of Louisiana has never decided the question whether under a policy like this and under facts like these the company can avail of a forfeiture when it retains the premium.

Mount is a citizen of Mississippi, the companies are domiciled in northern states, and the property insured happened to be in Louisiana, where the policies were written and delivered. It is useless to inquire whether this makes the contract a Louis-

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Brief for appellee.

iana contract or not, for it is conceded that there is nothing peculiar about the Louisiana law. The court is not being called on to construe any Louisiana statute. The ingenious argument of appellant that since the Louisiana statute provides the form of the contract, the construction of the contract becomes the construction of the statute, is not tenable. "The fact that the standard policy is prescribed by statute does not change its character as a contract. It is put forward by the legislature as a contract to be entered into by the parties and to derive its validity from their consent." 1 Cooley's Briefs on Insurance, 531, citing *Chichester* v. *N. H. Co.*, 74 Conn., 510; *Reed* v. *Wash. Co.*, 138 Mass., 572.

Certainly the fact that the legislature prescribes a form which the parties may or may not adopt as a contract does not make the liability of either statutory; it is still contractual. It is useless to try to forecast what the Louisiana supreme court will hold when the question is presented. If we are to judge from its opinions on analogous and cognate questions, we would conclude that it would line up with this court and others holding with it. The Louisiana court has expressly decided that where the agent of an insurance company accepts a premium after knowledge of the forfeiture or avoidance, the company waives the breach. *Union Nat. Bank* v. *Manhattan*, 52 La. Ann., 36.

If the law of any state is to be looked to as controlling, it would seem to be the law of New York, for Louisiana in 1898 adopted the standard form of policy prescribed by the legislature of New York, and it will be assumed that if the form of policy is to be treated as a statute Louisiana adopted it with the construction given it by the New York courts. The New York courts have uniformly held with the courts of other states that companies must act with perfect good faith with the collections and retentions of premiums or they will be held to waive the forfeitures. See Cooley's Briefs on Insurance, vol. 3, 2684.

3. Our next proposition is that the evidence shows that there was a substantial compliance with the iron safe clause. It is

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too well settled to need the citation of authority that substantial compliance of the iron safe clause is all that is required. The decisions of our court clearly hold or imply that that is the rule. Our court has held that the clause does not apply to books kept previous to the policy. *Ins. Co. v. Sheffy,* 71 Miss., 919, s.c., 16 South., 307. The same has been held in Louisiana. See *Richard* v. *Springfield Ins. Co.,* 114 La., 794.

The accidental failure to place a book containing part of an inventory in a safe is not fatal where the total has been carried into the ledger; and duplicate invoices have been held to be a sufficient substitute for an inventory accidentally left out of the safe and destroyed. Cooley's Briefs on Insurance, page 1828, citing *Merchant's Nat. Ins. Co.* v. *Dunbar,* 88 Ill. App., 575, and *McNutt* v. *Va. Fire Ins. Co.* (Tenn.), 45 S. W., 61; see also, as to loss of invoices, *Continental Fire Ins. Co.* v. *Cummings,* 78 S. W. Tex., 378; *Ins. Co.* v. *Cummings, Ib.,* 716.

4. Our next proposition is that the tender as finally made was insufficient.

Counsel for appellants unnecessarily cite many authorities to support the elementary proposition that a tender is unnecessary when by the acts or words of the party entitled to the payment the debtor is misled into not making it but none of the authorities cited go to the case where there has been nothing said or done to prevent a tender or to intimate whether it would be accepted or rejected.

The contention that there was no duty to return the premium because insured had not first surrendered the policy is without merit.

Argued orally by *Tim E. Cooper,* for appellant and *C. H. Alexander,* for appellee.

MAYES, J., delivered the opinion of the court.

The controversy in this case is as to policies No. 3,694 for the sum of $1,000, and No. 3,786 for $1,750, covering a stock of

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merchandise owned by appellee. It was conceded in the argument of this case, by counsel representing appellant, that the other policy mentioned in this record, No. 4,050, is not in controversy, and therefore what we say only applies to the two policies in question.

The first question which we consider is: Was there a breach of the iron safe clause contained in the policy? The policy of insurance contained the following clause with reference to that subject, viz.:

"(1) The assured will take a complete itemized inventory of stock on hand once in each calendar year, and, unless such intentory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

(2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy.

(3) The assured will keep such books and inventory—and also the last preceding inventory, if such has been taken—securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured will keep such books and inventory in some place not exposed to a fire which would destroy the aforesaid building; and unless such books and inventories are produced and delivered to this company for examination, after loss or damage by fire to the personal property insured hereunder, this policy shall be null and void, and no suit or action shall be maintained hereon. It is further agreed that the receipt of such books and inventories and the exami-

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nation of same shall not be an admission of any liability under this policy, nor a waiver of any defense to the same."

By the above clause the insured is required by the contract to "keep a set of books, which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments, both for cash and credit, from the date of inventory, as provided for in first section of this clause." The insurance under policy No. 3,694, was effected about the 1st of July, 1904, and the inventory is claimed to have been taken about the 1st of August of the same year. By the terms of the contract it became the duty of the insured to keep a set of books, presenting a complete record of business transacted, including all purchases, sales, and shipments, from the date the inventory is required to be taken, or through the life of the policy. There was a change of bookkeepers about the 1st of January, 1905, and a change in the method of keeping the books from a double entry to a single entry. When this change in the system of keeping books was made, the books kept prior to January 1, 1905, were footed up, and the aggregate amount of the footings of the old books, showing the purchases, sales, shipments, etc., brought forward and placed in the new books, so that the new books only contained the footings of the amount shown by the old books. From January 1, 1905, to the date of the fire, these new books containing these footings seem to have been kept down to the date of the fire, together with the inventory taken on the 1st of August, and were kept in the iron safe and produced after the fire. The old books were placed on top of the safe, and when the fire occurred they were burned, so that when the adjuster reached the premises the only books that were produced were the books kept from January 1, 1905, containing the footings brought forward from the books kept from July, 1904, to January, 1905. It is not a matter of dispute that the books kept from the date of the issuance of the policy to the 1st of January were not kept in the safe and were destroyed

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in the fire. We think, under these facts, there was no compliance with the iron safe clause. The reasonable enforcement of iron safe clause in insurance policies has been universally upheld by the courts. Indeed, to prevent fraud, and for protection of the rights of insurance companies, some such clause seems necessary.

This case presents on its face quite a different case from that of *Insurance Co.* v. *Sheffy,* 71 Miss., 919, 16 South., 307. In the *Sheffy case* the court said: "The evidence shows very clearly that the application of the insured for the policy in suit was completed and signed, and the policy delivered, not earlier than the 17th day of December, 1892. We may properly assume, so far as the rights of the insurer are affected by the date of the contract, that it was actually made on the day named. On that very day the insured took a new inventory of his stock of goods, and this last inventory, as well as the two preceding ones, dated, respectively, September 17, 1892, and December 17, 1891, were kept in the iron safe, and were produced after the loss. On the 17th day of December, 1892, the insured opened a new set of books, transferred to them all the footings or balances from his old books, and thereafter, from said 17th day of December, entered fully in the new set of books itemized statements of every transaction occurring in the conduct of the business. The forfeiture under the iron safe clause is, by the appellant, contended for because of the failure of the appellee to keep in the iron safe the old books, showing the itemized statements of the transactions antedating the policy sued on, and to produce them after the loss occurred. Why these old books of account were not kept in the safe, but were left outside and consumed in the fire which occasioned the loss is made clear by the evidence. It is perfectly apparent that the insured did exactly what this iron safe clause required him to do. This clause made it obligatory upon him to keep a set of books showing a record of business transacted, including all purchases and sales, both for cash and credit, and

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to keep the inventory and books securely locked in a fireproof safe, and this condition the insured fully complied with. His duty was to show a set of books showing a record of business thereafter transacted, including future purchases and sales. He did not consent to preserve indefinitely his old books, showing all the past transactions. So far as this contention may be concerned, it was immaterial whether he had any books of account antedating the policy. He had his inventory, showing the amount of stock he had when the policy was issued, and he was to keep a record of his future business transactions, with a view of disclosing, when necessary, when and where and how the stock went. We repeat, the duty laid upon him was prospective, and he fully met it." The decision in the *Sheffy case, supra,* will readily be distinguished from the facts presented by this case. Mount did not keep a record of his books prospectively, such as were required by the iron safe clause. From the date of the issuance of the insurance up to January, 1905, the books covering that period having been destroyed by fire, it was impossible for the insurance company to tell anything about the condition of the stock of goods, except from the balances brought forward and placed in the new books. There was no record kept during that time of sales, purchases, and shipments, as is required by the clause of the insurance policy referred to.

We come, now, to the next question involved: When there has been a forfeiture under the policy, known to the insurance company only after loss, and no act done by the insurance company which could mislead the insured in any way, or occasion him any inconvenience or trouble, and the insurance company has done nothing to waive its rights, either impliedly or expressly, except merely fail to return the unearned premium, will this single fact be considered as a waiver of the breach? The particular clause of the policy involving this question is as follows, viz.: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as here-

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inbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium." It is contended by appellee that a mere failure to return or offer to return the unearned premium, after loss has occurred and denial of liability on the part of the company, because of a breach of the conditions of the policy by the insured, will constitute a waiver on the part of the company to claim the forfeiture; and in support of this proposition appellee cites the *Dobbins cases* in 81 Miss., 623, 33 South., 504, and 81 Miss., 630, 33 South., 506. We do not understand that this court has ever held, in any case, that the mere fact of the failure of the insurance company to return the unearned premium after a loss has occurred, and until there has been a demand made upon it by the insured for this unearned premium and an offer to surrender the policy, will in itself, unaccompanied by any other fact, constitute a waiver of the forfeiture. In the case of *Dobbins* v. *Insurance Co.*, 81 Miss., 623, 33 South., 504, the court said: "The facts show that the fire occurred on the 23d of October. Dobbins notified the agent, Montague, on the 24th. Without knowledge at that time of the additional insurance, but six hours thereafter, on the same day, when there had been no change whatever in the condition of the parties, he was fully informed of the additional insurance. The insured, Dobbins, lived in the same town within a few minutes' easy communication. After full knowledge, on the 25th, of the other insurance, the agent had another conversation with Dobbins, in which he told him that the policy had been forfeited on account of the additional insurance, but that he would report the matter to the company; and, more than that, when Dobbins came to get blank proofs to make proof of loss, he furnished them. He furnished them, of course, for proofs to be made. There would have been no

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sense in the act otherwise. Furthermore, he testifies himself that he had power to cancel the policy, and was under no necessity to send it to the company for cancellation. The policy had been in force about one month. The insured had paid the premium for three years. No portion of the unearned premium was returned or offered to be returned." And the court, under these facts, because of the acts and conduct of the agent acting for the company, held that the insurance company was estopped to set up the forfeiture. It will be seen in this case that the question presented was not the single question of whether or not the mere retention of the premium by the company estopped the company from setting up the forfeiture on that ground. The decision is based upon the acts and conduct of the agent, and holds that under the facts in the case his acts and conduct estopped the insurance company to set up the forfeiture. In the second case of *Fire Ass'n* v. *Dobbins,* 81 Miss., 630, 33 South., 506, Dobbins sued the insurance company, and it defended on the ground that he had taken out other insurance on the same property, subsequent to taking out the policy sued on, without the knowledge and consent of the defendant company, and in violation of the terms of the contract of insurance which rendered the policy sued on void. In this case there was a conflict of testimony, and the case was tried before the court without a jury; both parties waiving a jury. The evidence for defendant was that the policy sued on was issued in July, 1901, and the premium paid to the company on September 1, 1901, by the local agents, and the fire occurred October 23, 1901, and plaintiff came into the office of the local agents October 24th, the next day after the fire, and notified them of the fire, when he was told that the premium due had not been paid by him. The premium was then paid to the local agents, and for the first time the agents found out that Dobbins had another policy on the same property; the agent testifying that he did not recollect whether it was before or after the premium was paid that Dobbins informed him of

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the existence of the other policy. The agent also testified that he then told Dobbins that the taking out of the other policy avoided the policy sued on, but that he would send in the report of it to the company. On the other hand, the plaintiff testified that he informed the local agents of the fire on the 24th of October, and then informed them of the other policy, and went back the next day and paid the premium and got a receipt. The insurance company never returned or offered to return any part of the premium. On these facts, there being a conflict in the evidence, the plaintiff claiming that he informed the local agents of the fire on the 24th of October, and that he then informed them of the other policy, about which they made no objections so far as the facts show, and after notifying them of the loss, and informing them of the other policy, went back the next day and paid the premium and got a receipt, and still, though the insurance company under these facts declared the policy forfeited, it did not offer to return the premium, the court said, because the insurance company held onto the premiums with full knowledge of the loss, having taken the premiums after the loss, it could not set up the forfeiture.

We do not think that either one of the cases in 81 Miss., and 33 South., holds, or intended to hold, that the mere fact, unaccompanied by any other circumstances, where knowledge comes long after the premiums are paid and the insurance effected and loss occurs, and when the only contest that exists between the parties is as to liability under the policy, that the insurance company does not offer to return the unearned premiums will estop it from claiming the forfeiture; nor do we find any other case that holds this. In both the *Dobbins cases* it clearly appears that the insurance company had done something affirmatively changing the condition of the insured, and thereby creating an estoppel on the part of the insurance company to claim the forfeiture. In both those cases premiums were received by the insurance company after the loss had oc-

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curred, and when it was manifest that the company knew of the loss, or knew such facts and circumstances as would bind it with knowledge. No such case is presented here. The premiums in this case were paid at the time the policies were issued, and the breach of condition was not discovered until after the loss had occurred. The insurance company denied liability as soon as the adjuster reached the place where the loss occurred. In this case, under its facts, it was not necessary for the insurance company to tender the unearned premium until there was a demand made upon it for same and an offer on part of insured to surrender the policy. No demand having ever been made for the unearned premium, and no offer having ever been made to surrender the policy, the insurance company had a right to wait for this. When it was sued on the policy by the insured for its full amount, it had a right to rely upon the breach of the iron safe clause, and plead it, and then and there tender with their plea the unearned portion of the premium; and this delay, under the facts in this record, created no waiver or estoppel. If they denied liability as to all the policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was nevertheless good as to that policy on which they were not liable. It was the duty of appellees to accept such part of the tender as appellants could lawfully make. Policy No. 3,786 is not invalidated as to that part of it which covers fixtures in the store, but is invalidated only to the extent that it covers the stock of goods. See *Mitchell* v. *Insurance Co.*, 72 Miss., 53, 18 South., 86, 48 Am. St. Rep., 535.

Reversed and remanded.

SUGGESTION OF ERROR.

After the rendition of the foregoing opinion the appellant company filed a suggestion of error asking for a reconsideration of the decision in so far as the court held that the policies should not be invalidated as to such parts as covered the fur-

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Supplemental opinion.

niture and fixtures in the store building; appellant suggesting that the policies should be invalidated *in toto;* that, although the court had held, in *Mitchell* v. *Insurance Company,* 72 Miss., 53, 18 South. Rep., 86, that policies such as these in controversy, when issued and delivered in Mississippi were divisible as to goods and fixtures, yet the law in Louisiana, as shown in the case of *St. Landry* v. *Insurance Company,* was different, the Louisiana supreme court, in that case, having held that such policies were entire and indivisible; and that, as the policies in controversy were issued and delivered to the appellee in Louisiana the Louisiana law should govern.

In response to which suggestion of error,

MAYES, J., delivered the following supplemental opinion:

It appearing on suggestion of error that the policies of insurance sued on were made in the state of Louisiana, it is the opinion of the court that the judgment should be modified, so as to invalidate that part of policies No. 3,786 and No. 4,050, covering the fixtures in the store, as well as that part which covers the stock of goods, in conformity to the decision of the Louisiana courts upon this subject. The case of *Mitchell* v. *Insurance Company,* 72 Miss., 53, 18 South., 86, 48 Am. St. Rep., 535, is not applicable here, since the contract of insurance is a Louisiana contract, merely brought into this state for purposes of suit; the Louisiana courts having held contrary to the *Mitchell case, supra.*

To the extent indicated in this opinion, the suggestion of error is sustained.

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Statement of the case

AUGUSTA W. WALL ET AL. v. JOHN W. HARRIS.

[44 South., 36.]

EQUITY. *Injunction. Action at law. Unconscionable advantage. Deed of trust. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred by the statute of limitations.

FROM the chancery court of Marshall county.

HON. JULIAN C. WILSON, Chancellor.

Harris, appellee, was complainant in the court below; Mrs. Wall and others, appellants, were defendants there. The demurrer of defendants to the bill of complaint was overruled and they appealed from the decree overruling it to the supreme court.

Smith & Totten, for appellants.

The remedy on mortgages is barred when the debt is barred. Code 1906, § 3093; Code 1892, § 2733.

The indebtedness secured by the deed of trust being an ordinary promissory note, the statute of limitations of six years applied to it. The note was given on the 1st day of January, 1892, and became barred on the 4th day of January, 1899.

The sale being void, and appellee being barred, he holds the land as a trespasser, pure and simple.

The statute of limitation of ten years' adverse possession began to run in appellee's favor on the 1st day of January, 1898, and continued thus to run until the bringing of the ejectment suit against him, a period of less than ten years.

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Statement of the case.

Now, had the statute of ten years become complete in favor of appellee, before the bringing of this suit, then the sore on appellee's title would have healed, and his title have become perfected; but on January 1, 1899, his right of action on the note became barred. Had the ten years' statute applied, then the right of these appellants would have been lost, and we desire to ask if the law is more tender in enforcing one statute of limitations than another. Are not appellants' rights to the benefit of the six ears' statute of limitation as equitable, when it has matured, as would be appellee's right to quiet title under the ten years' statute of limitation, if the same had matured?

If appellee, without any pretense of right, had gone into the possession of appellant's land and held for ten years adversely, his title would have become absolute by the *vis major* of the statute. This way of acquiring title has no equity with it, but it is in accordance with the statute. Will the law permit appellant to put in motion a statute of limitation in his favor, and not hold him responsive to the statute that runs against him at the same time? Is it right to allow the statute to run in his favor and to stay the effect of the statute that runs against him?

A *cestui que trust* cannot by law become a mortgagee in possession. Jones on Mortgages, sec. 719. Certain circumstances may, however, occur whereby the law may treat him as such; but it can only arise out of the peculiar conditions of facts in a given case, by applying the doctrine of estoppel upon facts justifying the same. There is nothing in this case to give place to the doctrine of estoppel. The learned chancellor in the court below based his decision in this case on the case of *Lucas* v. *Mortgage Co.*, 72 Miss., 366, s.c., 16, South., 358. The facts in this case are entirely different. Here the pretended sale was made on the 4th day of September, 1897, ignoring the requirements of chapter 96, Laws 1896, regarding sales by substituted trustees under deeds of trust. The appointment of the substituted trustee not having been spread at

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large upon the records, or by separate instruments recorded, etc. This statute renders that sale void, and Code 1906, § 2773 (being Laws 1896, ch. 96, brought forward), denounces it as absolutely null and void, both at law and in equity.

In conclusion, we submit that appellee knew or should have known from the first that he acquired no title to the land under the sale. It was his act in procuring the illegal sale, and he was alone responsible for the nature of the title that he got thereunder; and he should not now be heard in an attempt to make valid his illegal taking of appellants' property, in open violation of the statute.

Again, we submit, that while at common law the legal estate vested in the mortgagee, and was forfeited upon default of payment of the indebtedness thereby secured, our statute has changed this, and the mortgagor is deemed the owner of the legal title, and when the debt is barred, the remedy in equity on the mortgage is likewise barred. Code 1892, § 2733, Code 1906, § 3093.

Further, it would be unjust to appellants in this case to apply the doctrine of a mortgagee in possession, as appellee has never, since he took possession of the land, recognized that he held the same in trust for the appellants, as is the case required of mortgagees in possession. Jones on Mortgages, sec. 10.

Mayes & Longstreet, for appellee.

The demurrer raises two questions: 1. Whether the statute of limitations runs against the debt to a mortgagee in possession, and 2, whether, even if so, the right to have a foreclosure sale by judicial decree is, in Mississippi, always barred when the debt secured is barred by the statute of limitations, or, whether under circumstances where an actual or constructive fraud would be thereby effected, the defendants may not be eqitably estopped to set up the bar.

It is well settled that a mortgagee who obtains possession

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Brief for appellee.

peaceably, will not be dispossessed until the debt is fully paid; and this principle is not to be avoided by the fact that the personal liability on the debt is barred. "The mortgagee may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of this debt." *Cook* v. *Cooper,* 18 Ore., 142. See also, *Helm* v. *Yerger,* 61 Miss., 44–51; *Den* v. *Wright,* 7 N. J. Law, 175; *Frank* v. *LeRoy,* 49 Calif., 314; *Spect* v. *Spect,* 13 L. R. A., 137; *Fountain* v. *Brooks Strader,* 141 Ill., 461.

The question here is not as to the right of a mortgagee out of possession to have judicial foreclosure; but the different question of whether the statute runs at all against the right to proceed *in rem* while the mortgagee is rightfully in possession. We submit that it does not. The peaceable possession by the mortgagee is analogous to the filing of a bill for foreclosure, so far as the running of the statute of limitations is concerned, and suspends it as in the case of the filing of a bill. *McDonald* v. *Vinson,* 56 Miss., 497.

Code 1892, § 2733, relied on by appellants, does not govern this case, but has relation to the independent remedies of a mortgagee out of possession; and its whole purpose is clearly expressed in its final clause, that "in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred." This is clearly a dealing with the old distinction between the method of judicial procedure for a judgment *in personam,* and the method for a judgment *in rem.*

In the case of *Haggart* v. *Wilczinski,* 143 Fed. Rep., 22 (74 C. C. A., 176), the United States circuit court of appeals held that our Code of 1892, § 2733, does not apply to mortgagees in possession. This case cited is almost identical in its facts with the case at bar. See also, *Allen* v. *Alliance Trust Co.,* 84 Miss., 319, s.c., 36 South., 285.

It is Code 1892, § 2732, which controls in the case of a mort-

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gagee in possession. We submit that this section should be considered in this case, in connection with Code 1892, § 2749, on the subject of when the limitation of action begins to run in a case of concealed fraud.

Even if the statute of limitations does run against the mortgagee in possession, the facts in this case would establish an estoppel against the defendants such as would place them beyond the pale of the operation of the statute. *Suggs* v. *Thrasher,* 30 Miss., 135. The mortgagors by remaining quiet and inactive, when it was incumbent upon them to declare themselves (the sale being voidable at their election, and not void), led the mortgagee into believing that they had elected to treat the sale and credit of proceeds as binding; and since the mortgagee, relying on this implied representation, and consequently, believing that his title was a good one, allowed his debt and remedy to become barred at law, equity will not permit the mortgagors to now come forward and avail themselves of a mere legal technicality to dispossess the mortgagee of the land, when to do so, would work a gross injustice and a harsh injury. *Stratton* v. *Bryant,* 55 Miss., 251.

Argued orally by *Lucius L. Mayes,* for appellee.

CALHOON, J., delivered the opinion of the court.

The appellant, Augusta W. Wall, and her husband, James M. Wall, executed their promissory note for $746 to appellee, Harris, in June, 1892, and on the same day executed a trust deed to W. G. Phillips as trustee to secure that note, which note became due on January 1, 1893, and carried interest from its date at the rate of ten per cent per annum. This note was permitted to run on unpaid until 1897, when, Phillips having refused to execute the trust, Harris, the beneficiary, appointed one Bennett as substituted trustee; but this appointment of substitution was not recorded. After due advertisement the substituted trustee, Bennett, sold the land on

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Opinion of the court.

September 4, 1897, according to the terms of the trust deed, and appellee, Harris, became the purchaser of it for $690, and his bid was duly credited on the note. On January 1 thereafter (1898) Harris took possession of the land, and continued in such possession, without dispute or interruption, for eight years, and until July, 1906, when Mrs. Wall and the heirs of her deceased husband, James M. Wall, brought ejectment against Harris, the beneficiary of the trust deed, in the circuit court, for the possession of the land and mesne profits and damages, which the declaration makes to aggregate about $1,500. Thereupon the appellee, Harris, filed his bill in chancery, which concedes that the sale by the substituted trustee was irregular under the previous decisions of this court, but states that there remained still due him on the indebtedness about $800, to which he is entitled, and that, if the ejectment suit should be permitted to proceed, he would be deprived of the possession of the land, which, as he asserts, he is, as mortgagee in possession, entitled to hold until the indebtedness is paid, notwithstanding he got possession under this irregular and invalid sale, and for an account, etc., and for final decree perpetuating the injunction and directing payment of any balance that may be due him on the note, and that they be required to pay within a time to be fixed, and upon failure to do so that the land should be decreed to be sold for the payment, and for general relief. On his prayer the appellants were enjoined from further prosecuting the ejectment suit until the hearing of the equity procedure. The appellants demurred to this bill, and their demurrer was overruled, and they appeal.

It would shock the conscience of the court if this beneficiary in peaceable possession should be required to give up the land, and appellants be permitted to hold to the same, and also to avoid payment of the debt. We regard this question as settled by a concluding paragraph of the opinion of this court in *Allen* v. *Alliance Trust Co.*, 84 Miss., 319, 36 South., 285, and by the same case, with a different party complainant,

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Syllabus.

styled *Haggard* v. *Wilczinski,* 143 Fed., 22, 74 C. C. A., 176. We apprehend that no court would permit the grantors in a trust deed, under the circumstances set forth in this bill, to stand quietly by for eight years, with the beneficiary peaceably in possession, and wait until the note which the trust deed secured became barred by limitation, and then take the land free from the obligation of any of the debt and with rents and profits. The only protection in this situation which the beneficiary had was to file a bill stopping such a claim in a law court, with the full tender to do equity in every regard. Such appeal to a court of conscience furnishes the only defensive course which the beneficiary could pursue.

Affirmed and remanded.

ROBERT A. GORDON v. BENJAMIN D. ANDERSON.

[44 South., 67.]

1. FRAUDULENT CONVEYANCES. *Statute of limitations. Code* 1906, §§ 3090, 3091, 3094.

The actual, adverse and continuous possession of land for ten years, claiming it as owner, will defeat a suit to set aside the occupant's deed, duly recorded for that length of time, as having been executed to defeat the creditors of his grantor.

2. SAME. *Concealed fraud.* Code 1906, § 3109. *Burden of proof.*

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim.

3. SAME. *Case.*

Where a grantee filed his deed to land for record promptly after its execution, took actual adverse possession of the land and occupied it continuously for ten years, claiming it as his own adversely to all the world, a suit by the creditors of his grantor, or those claiming under them, based on the charge that the deed to him was fraudulent as to such creditors cannot be maintained, certainly not in the absence of exceptional circumstances.

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Brief for appellant.

FROM the chancery court of Pontotoc county.

HON. JOHN Q. ROBINS, chancellor.

Anderson, appellee, was complainant in the court below; Gordon, appellant, was defendant there. From a decree partly in complainant's favor defendant appealed to the supreme court and complainant prosecuted a cross-appeal.

The facts are fully stated in the opinion of the court.

R. V. Fletcher, Brame & Brame, and *Williams & Bates,* for appellant and cross-appellees.

In view of the long lapse of time after the deed to Gordon was recorded and after proof of actual notice thereof on the part of Ezell it was incumbent on Anderson, the complainant (who purchased from Ezell only a short while before suit) to prove not only that he was ignorant of the fraud but that Ezell was ignorant of it and could not have discovered it by the exercise of reasonable diligence. *Peck* v. *Bank,* 7 L. R. A., 726, and note. There is absolutely no proof on this subject.

It is not pretended that Gordon was guilty of any affirmative act or line of conduct which would mislead or deceive the other party. Nor was there any relation of confidence which required him to make any report or to furnish information. The parties were at arm's length and so dealt with each other. The judgment creditor himself, being the aggressor, had proceeded to have the land sold under his execution nineteen years before the bill in this case was filed. He could only sell the land under execution upon the theory that the conveyance to Gordon was fraudulent and subject to be decreed void, and the record shows that he had full knowledge of his rights and took steps to enforce the same in 1886, but afterwards abandoned the matter and nothing further was done until the bill was filed in 1905, three days after Anderson appeared on the scene. It is difficult to conceive a stronger case against the application of the doctrine of concealed fraud. The established doctrine is that not only must it be shown that there was a concealed

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fraud, but the creditor must show that it could not have been discovered by reasonable diligence on his part. *Buckner* v. *Calcote,* 28 Miss., 432; *State* v. *Furlong,* 60 Miss., 839; *Hudson* v. *Kimbrough,* 74 Miss., 341, s.c., 20 South., 885; *Jones* v. *Rogers,* 85 Miss., 802, s.c., 38 South, 742; *Thornton* v. *Natchez,* 88 Miss., 1, s.c., 41 South., 498. In the last mentioned case, referring to § 2731 of the Code, this court said:

"If we could imagine a concealed fraud, then clearly under the same section, with reasonable diligence it might have been first known or discovered, before the statute began to run. Under this section, 2731, and sections 2749–2762, we hold the bar complete. *Barkery* v. *Barrows,* 138 Mass., 578; *Elder* v. *McCloskey,* 70 Fed., 529, 17 C. C. A., 251."

Inasmuch as our position is thoroughly sustained by the decisions of this court, we hardly feel at liberty to cite other authorities, but on the general subject we refer to 19 Ency. L., pp. 250 and 251, and the many cases there cited. See also the note in *Miller* v. *Powers,* 4 L. R. A., 483.

"If it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun, fails to prosecute it in a reasonable manner, the inference of actual notice is necessary and absolute." *Peck* v. *Bank,* 7 L. R. A., 827, and numerous authorities cited, including Mississippi cases.

After long delay, necessity for complainant to allege and show clearly reasons for not proceeding earlier, see *March* v. *Whitmore,* 21 Wall., 185; *Teall* v. *Slaven,* 40 Fed., 774; and many cases there cited.

Even if we should be wrong in our contention that the right to attack the conveyance was lost by delay of nearly twenty years after the parties had notice, we deny that under the facts shown by this record there was any concealed fraud.

There is no evidence whatever of any agreement to keep the facts relating to the conveyance secret, and in truth there was no

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secrecy except in relation to the mere matters concerning the consideration of the deed. In the case of *State* v. *Furlong,* 60 Miss., 839, this court, in answer to the argument that the sheriff who was charged with fraud in that case, occupied a relation of trust and confidence, said:

"We cannot say that any relation of trust and confidence existed between him and the state. Where no such relation exists, where the reasonable diligence would have revealed, and where there has been no affirmative conduct or declaration calculated to lull suspicion, no fraudulent concealment within the meaning of the law has been made out. *Calcote* v. *Buckner,* 28 Miss., 432."

There must be some affirmative action or line of conduct to constitute a fraudulent concealment. A mere passive silence does not amount to such concealment. *Churchmen* v. *Indianapolis,* 100 Ind., 259; *Miller* v. *Powers,* 119 Iowa, 79.

There is a wide and fatal gap in complainant's case. He offered no evidence whatever to show that either he or his grantor, Ezell, were ignorant of the alleged fraud, or that it could not be discovered, or that any diligence at all was exercised. This ought to be the end of the case. *Jones* v. *Rogers,* 85 Miss., 802, s.c., 38 South., 742.

Fontaine & Fontaine, and *Thomas J. Buchanan,* for appellee and cross-appellant.

The decided weight of authority in equity is, that where relief is asked on the ground of actual fraud, especially if such fraud is concealed, time will not run in favor of the defendant until the discovery of the fraud, or until with reasonable diligence it might have been discovered. *Kimberly* v. *Lake Shore, etc., R. R. Co.,* 120 U. S., 136; and authorities cited.

And our statute provides: "In every case of concealed fraud the right of any person to bring suit in equity for the recovery of land of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued, at and not before the time which the

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fraud shall, or with reasonable diligence, might have been first shown or discovered." Code 1892, §·2731; *Thornton* v. *Natchez,* 88 Miss., 1, s.c., 41 South., 498.

To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure. *Bailey* v. *Glover,* 21 Wall. U. S., 349.

The adverse possession of defendant, Gordon, has nothing to do with the question or with the operation of this particular statute. Code 1892, § 2731. The point in the case is has complainant brought his suit within the time limited by the statute, after his cause of action accrued.

To prevent this statute from beginning to run, complainant must allege: (1) Fraud and the facts constituting it; (2) that the acts of fraud were committed by the defendant, or some one in privity with him: (3) that they were concealed from complainant by defendant or his privies; (4) that complainant did not discover, or know of this fraud over ten years before instituting his suit; (5) he must also allege and show that he exercised reasonable diligence to discover it sooner, or that he could not with reasonable diligence have discovered it sooner. 19 Am. & Eng. Ency. L., 242; 3d paragraph; *Jones* v. *Rogers,* 85 Miss., 836, s.c., 38 South., 742; *Alabama, etc., R'y Co.* v. *Thomas,* 86 Miss., 27, s.c., 38 South. 770.

All of these facts are alleged in complainant's bill in this case. And as a matter of fact the chancellor found that they had all been fully established by the testimony which was ample, which finding of the chancellor on the facts is analogous to the finding of a jury.

Argued orally by *L. Brame,* for appellant, and *T. J. Buchanan,* for appellee.

CALHOON, J., delivered the opinion of the court.

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Opinion of the court.

On February 27, 1905, Anderson filed his bill against Gordon to cancel a conveyance executed by L. J. Staten to Gordon on December 21, 1885, on the ground that it was executed with intent to defraud creditors and was a cloud on his title, which he claims to derive from a sheriff's deed made to one Ezell, his vendor, upon an execution from a law court of date December 6, 1886. Both the deed sought to be canceled and the sheriff's deed conveyed the same property, consisting of two tracts of land, one of sixty acres and the other of seventy-five acres, of which the sixty-acre tract was cultivated and the seventy-five-acre tract in woods; the two tracts being some distance apart, about a mile or less. On December 21, 1885, the date of the deed from L. J. Staten to Gordon sought to be canceled, it is admitted by the bill that L. J. Staten was in the "possession and ownership" of both tracts. The deed to Gordon was a warranty deed duly executed and acknowledged, and was put on record the day of its execution, and Gordon took actual possession of the sixty acres embraced in the deed, upon which there were some improvements, and held it and the seventy-five-acre tract under notorious claim of ownership from that time on continuously up to the date of the commencement of this suit, nineteen or twenty years. He notoriously claimed it all, and paid taxes on all of it from the date of his purchase. On February 13, 1886, execution was issued on the judgment of Ezell, levied on both tracts, and they were sold on August 2, 1886, by the sheriff, and purchased by E. J. Ezell, and the sheriff made Ezell a deed conveying both tracts, of date December 6, 1886, which deed was also recorded on the day of its execution. Now, with this possession and claim of possession by Gordon continuing until February 24, 1905, E. J. Ezell for the recited consideration of only $25 executed to Anderson a deed of conveyance of the land, and just three days after that, on February 27, 1905. Anderson filed this bill against Gordon, charging, as we have said, that the deed of L. J. Staten to him in 1885 was made

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with intent to defraud Ezell, and that the deed from Staten to Gordon "was carefully concealed and not discovered until September, 1904, and was wholly unknown either to Anderson or Ezell until after that time, after the exercise of reasonable diligence to discover the same." The bill charges that Staten was "seised and possessed" of both tracts when he made the deed to Gordon, and the answer admits this. The answer admits Staten's ownership and possession of the land, and the purchase by Gordon in 1885, and the judgment in favor of Ezell, and the sale of the land to him in 1886, but denies all fraud or concealed fraud and sets up his ownership and possession and the ten-year statute of limitations. The final decree sustained Gordon's title to the sixty-acre tract, but canceled Staten's conveyance to him as to the seventy-five-acre tract.

We approve the conclusion of the chancellor that Gordon cannot be disturbed by Anderson as to the sixty-acre tract, and affirm his decree as to that on the cross-appeal, and proceed now to consider that part of the final decree canceling the conveyance of Staten to Gordon of the seventy-five-acre tract. The law is plain that a period of ten years bars; but, in case of concealed fraud, the right to sue "shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered." The fact that the seventy-five-acre tract was woodland, and not in actual possession by Gordon, has no effect in this case on the statute of limitations, because, when Staten, the common source of title, conveyed to him, he was, as admitted, "seised and possessed" of this land. As to these litigants he was then the owner, and the law in such cases attaches possession to the title, and it went to Gordon with the conveyance, and not as in case of a mere intruder, who must be in actual occupation to invoke the statute. The deed was valid on its face, valid forever as against Staten, and voidable by his creditors only on attack seasonably made. On

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get, what it ought to have, the fair sales and just prices which can only be obtained where open competition exists. The contention that the ratification of a contract is not within sec. 109 of the constitution is far too technical. It would destroy the purpose of the section.

It is only necessary to say, in regard to § 3446 of the Code of 1906, that no retrospective effect can be given to that section, and for that reason it has no application in this case. It may be very gravely questioned whether the distinction drawn in that section between cities or towns of over four thousand inhabitants is constitutional, in any event; but we decide nothing as to that in this case, since it is not necessary to decision.

The decree is reversed, injunction reinstated, and the cause remanded, to be proceeded with in accordance with this opinion.

ÆTNA INSURANCE COMPANY *v.* JAMES B. MOUNT.

[44 South., 162.]

1. INSURANCE. *Fire policy. Fireproof safe clause. Evidence.*

A merchant, having a policy of fire insurance on his merchandise conditioned on his keeping books showing the status of his business and requiring him to deposit them in a fireproof safe when the store was not open for business, failed to comply with the policy when he changed his system of bookkeeping, used new books, which brought forward only the footings of the old ones, and did not keep the old books in a fireproof safe, whereby they were destroyed in the fire which burned up the merchandise.

2. SAME. *Waiver. Failure to return unearned premium.*

An insurer, in a policy containing the usual iron safe clause and stipulating that if the policy should become void the unearned portion of the premium should be returned, does not waive a breach of the iron safe clause by failing, after knowledge of the loss, to return or offer to return the unearned portion of the premium; no demand having been made, nor any offer to surrender the policy.

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Statement of the case.

3. SAME. *Pleading. Tender.*

Where in a suit on a fire insurance policy a breach of the fireproof safe clause is a defense, the defendant may, the policy providing for return of the unearned part of the premium when it becomes void, plead the breach and tender the unearned portion of the premium with the plea.

4. SAME. *Several policies. Tender good to some.*

Where an insurer denied liability on several fire policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was good as to that policy on which it was not liable.

FROM the circuit court of, first district, Hinds county.

HON. DAVID M. MILLER, Judge.

Mount, appellee, was plaintiff in the court below; the insurance company, appellant, was defendant there. From a judgment in plaintiff's favor defendant appealed to the supreme court.

The plaintiff, a merchant engaged in business in the town of Smithland, in Point Coupe Parish, Louisiana, at which point was located his store building containing a stock of goods and merchandise, took out three policies of fire insurance with the defendant company, as follows: one policy, dated July 1, 1904, numbered 3,694, for $1,000 on his stock of merchandise while contained in the aforesaid building; one policy dated September 11, 1904, numbered 3,786, for $1,750, of which $1,500 covered his stock of merchandise aforesaid, and $250 his store furniture and fixtures and iron safe in the store building; and one policy dated March 5, 1905, numbered 4,050, for $900 jointly on his stock of merchandise and on his store furniture and fixtures. All three policies were of the kind commonly known as the New York Standard form, and were issued and delivered to the plaintiff by the defendant company's agency in Baton Rouge, Louisiana. On May 1, 1905, within the period of insurance stipulated in the policies, the store building and goods and merchandise therein were totally destroyed by fire. The defendant having refused to pay the amounts of the policies, the plaintiff brought this suit to

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Brief for appellant.

recover the amounts stated, aggregating $3,515. In addition to plea of general issue the defendant set up by, special plea, an alleged violation by the plaintiff of the fire proof safe clause of the policies as shown in the opinion. The plaintiff's replication to the special plea was that the defendant failed after the fire and before suit brought to tender back to plaintiff the unearned portion of the premium and was estopped to set up such defense. A demurrer by the defendant to the replication was overruled, and the defendant joined issue on the special plea. Tender of the unearned part of the premium was made by the defendant in court with its pleadings. No demand was made by plaintiff, before suit, for the unearned part of the premiums. The facts as to the pleadings and evidence are further stated in the opinion.

McLaurin, Armistead & Brien, and *Tim E. Cooper,* for appellant.

The two principal questions presented by this appeal are:

First, whether if this insurance had been taken out in the state of Mississippi, on property situated here, the insurance company could rely upon the breach of the iron safe clause, without returning or offering to return the unearned premium. And if this question is answered in the negative;

Second, whether, since this was a Louisiana contract, and since it is held in that state to be unnecessary to return the unearned premium, this court will follow the Louisiana rule and permit the defense to be made here, which might have been made if the policy had been there sued on.

But for the decisions in *Insurance Company* v. *Dobbins,* 81 Miss., one case on p. 623, s.c., 33 South, 504, and the other on p. 630, we would approach the discussion of the first question in the utmost confidence, and could, we think, assert that no case could be found holding that the insurer must return the premium as a condition of avoiding the policy. We concede that the language of the court in those cases suggests that a return of

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the unearned premium is necessary, if the breach of the policy is insisted on; but the question there presented was different from that now before the court in this, that the premiums in those cases were received by the insurance company after the loss had occurred, while the premiums in this case were paid at the time the policies were issued. We will take up the cases referred to by the court in its opinions in 81 Miss., and we shall attempt to show that they are irrelevant to the question here involved, and that in each state from which this court cited decisions, the rule is well settled that a return of the premiums is not required.

The notes of Mr. Freeman to the case of *Wheaton* v. *North British Insurance Co.*, 9 Am. St. Rep., 237, referred to by this court in its opinion, does not refer to the question here involved. The annotator there was dealing not with the question of the construction of the contract of insurance, and whether if a breach was insisted upon, the insurer was required *by the contract* to return the unearned premium. Mr. Freeman was referring to the question of estoppel by the conduct of the insurer after the loss had occurred, by which conduct the insured was invited to, and relying on which conduct he had incurred expense and the trouble of making proofs of loss. Works on insurance and in the decisions as a "waiver," but Mr. Freeman more accurately refers to it as an estoppel against the insurer. It is estoppel known in the books as an "estoppel by misrepresentation." Now, a waiver is a contract, and not only must the minds of the party meet upon it as a contract, but like all other contracts, it must be supported by a consideration, unless being acted on it becomes estoppel. 20 Ency. of Law, 1097; *Ripley* v. *Insurance Co.*, 30 N. Y., 446; *Stewart* v. *Crosby*, 50 Me., 134; *Howie* v. *Insurance Co.*, 32 Conn., 21. Mr. Bigelow's definition of an estoppel by misrepresentation is this:

"By misrepresentation is meant a false impression of some fact or set of facts created upon the mind of one person by

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another, by language, or by language and conduct together, or conduct alone equivalent to language, where there appears to be no intention to warrant the same." If after loss has occurred under a policy which has been breached by the insured, by which breach the policy is forfeited, the insurer is then for the first time informed of the fact, he may stand upon the forfeiture according to the terms of the contract; but if he does not do this, but so conducts himself as to warrant the insured in believing that the forfeiture will not be insisted upon, and the insured relying on such representations, is induced to, and does, incur expense and trouble, this changed condition of the insured furnishes the consideration for the waiver and results in estoppel. Now, it is apparent that when, as in this case, the insurer does nothing to lead the insured to change his position, and there is no change in his condition, the doctrine of estoppel, or waiver, can have no application. The right of the insured in such case to recover must exist, if at all, by the contract of insurance, and not from the waiver by the insurer, acted on by the insured and resulting in estoppel. We do not think this proposition was intended to be controverted by anything said by this court in the *Dobbins cases, supra.* In those cases, the position of the assured was changed after the loss had occurred. We do not think it is necessary to further consider so much of the opinion of the court as refers to Mr. Freeman's notes to the case of *Wheaton* v. *Ins. Co.,* 18 Pac. Rep., 758.

Taking up the cases referred to by this court, and which relate directly to the question whether it is incumbent on the insurer to return the unearned premium, as a condition of relying upon the forfeiture for breach of the contract of insurance, we will examine first the case of *Schreiber* v. *German-American Hail Ins. Co.,* 43 Minn., 368. In that case, the insured had given notes in a mutual company for the premiums on the policies, and after the loss, the insurance company sued upon the notes and enforced their payment. The Minnesota

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court expressly put its opinion upon the ground that this was an assertion of the validity of the policy. The quotation from that opinion by this court ends just where the supreme court of Minnesota came to consider the precise question involved in the case now before the court. It is to be here observed that the policy in the Minnesota case was breached by taking out additional insurance, and that the company had notice of that insurance before the loss, and did not cancel its policy, but after the loss, coerced payment of notes given by the insured. But immediately following that part of the opinion of the Minnesota court, quoted by this court in the *Dobbins case,* the Minnesota court proceeded as follows: "We find no case exactly like this. There are some which seem to intimate that before electing to avoid wholly the policy, the insurer must return the premium even voluntarily paid. *Fishback* v. *Ins. Co.,* 54 Cal., 422; *Harris* v. *Equitable Life Ins. Co.,* 644 New York, 196; *Home Ins. Co.* v. *Riel* (Pa.), 17 Atl. Rep., 36. Without expressing any opinion of what is said in those cases, we do not hesitate to hold in this case, that the defendant could not retain the premiums thus collected, and also avoid the policy; that under the circumstances, it was the defendant's duty, as soon as it learned of the breach of the condition, to determine whether it would abide by the policy and retain the premiums, or restore them and elect to avoid it. It has never returned nor offered to return the premiums, and by retaining them must be deemed to have elected to abide by the policy." Of the cases referred to by the Minnesota court, it is sufficient to say, that in the New York case the objection was fraud in procuring the reinstatement of a lapsed policy, by reason of which the reinstatement never attached. It is further to be observed, that the recovery in that case was not for the amount of the policy, but only for the premiums paid.

In the case of *Home Life Ins. Co.* v. *Riel,* 17 Atl. Rep., 36, the defense was that the application for the insurance was not signed by the beneficiary. But she had paid the premiums for

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several years, and thus ratified the signature to the application, by whomsoever made. In the California case of *Fishback* v. *Ins. Co.*, 54 Cal., 422, the defense was prior insurance, by reason of which the insurance sued upon never attached. But the agent had notice of it at the time he issued the policy, and so it was held that issuing the policy with that notice, waived the prior insurance. Again, it appeared that after the loss, the adjuster, with full notice, misled the insured into believing that the company would pay its part of the loss, by reason of which he settled with other companies for their proportionate part, and the company was held to be estopped by this. The opinion contains not a single citation of authority, and only a few lines in reference to the return of the premium. The citation of the *Schreiber case* by this court would range the Minnesota court in the favor of rule that the unearned premiums must be returned. But as appears from the cases cited above the Minnesota court has declined to so hold. See also *Johnson* v. *American Ins. Co.*, 41 Minn., 399.

We come now to the case of *Johnson* v. *The Southern Mutual Life Ins. Co.*, 79 Ky., 406, cited by this court. The company there had issued a policy which contained a stipulation that failure to pay premiums should avoid the policy, but that if as much as three years' premium be paid, then, notwithstanding the forfeiture, a new paid-up policy would be issued, upon demand, within thirty days after the forfeiture, for the equitable value of the original policy. Johnson, the insured, had paid five years' premiums of $129.88 each. A premium fell due October 21, 1875, and he paid in cash, $22.88, and gave his note for $107, due ninety days after date. The cash paid, and the note, would have carried the policy to October 21, 1876. Soon after the maturity of the note, the company without returning the note, gave notice that the policy was forfeited, but it continuously thereafter claimed to own the note, which, as we have said, would have carried the policy until

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Brief for appellant.

October 21, 1876. The company was then claiming the note, which represented the whole year's premium, and in the meantime, asserting a right to forfeit the policy before the end of the year. It is to be observed, however, that all that was involved in that case was the right to a paid-up policy, according to the value of the old policy, measured by the premiums which had been paid on it, and the only relief obtained was for this paid-up policy.

In the case of *Phœnix Ins. Co.* v. *Stevenson,* 78 Ky., 150, the precise question now under consideration was involved. In that case the insurer issued to the insured a policy of insurance upon his house for $3,000, providing in the policy that if he insured his house in any other company without the consent of the insurance company, the policy was to be void. He did insure his house in other companies, without the consent of the insurance company, and the house was burned. It was there held that it was not the duty of the company, after being informed of the additional insurance and the burning, to return the premium for the time the policy had to run, from the burning to the expiration of the policy. See also May on Insurance, 505, 507; Flanders on Fire Insurance, 170.

The court also refers to the case of *Phœnix Ins. Co.* v. *Tomlinson,* 125 Ind., 84. In that case the insured had given a note for the premium and the policy contained a provision that in case the assured failed to pay the premium note at the time specified, the policy should not be in force and should remain null and void during the time said note remained unpaid after its maturity, and no action on the part of the company to enforce payment should be construed as reviving the policy, the payment of the premium after reviving the policy making it good for the balance of the term. The policy also contained another provision, that in case of loss any note due by the assured should be deducted from the insurance. The note was not paid by the assured and while it was unpaid the property was destroyed. After the loss the company with full knowl-

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edge received payment of the note. The court in considering the policy held that, since it could not be assumed that the assured was paying the note on a policy, which could not be enforced, and the company must have so understood that this was a waiver, and drew a distinction between that and another case in which a note had been given and after its maturity the loss occurred, and the note was never paid. It is, however, well settled in Indiana, that when a policy becomes void by reason of the act of the assured, he is not entitled to receive back any part of the premium. *Ins. Co.* v. *Houser,* 111 Ind., 266; *Ins. Co.* v. *Daubenspiel,* 115 Ind., 306. See also *Millers Manufacturing Ins. Co.* v. *Parsons et al.,* 106 North Western, 485, reported also in Lawyers R. A., vol. 4, New Series, p. 231; *Georgia Home Ins. Co.* v. *Rosenfield,* 37 C. C. A., 96; *Austin* v. *Mutual Reserve Fund Life Ass'n,* 132 Fed., 555; *Houdeck* v. *Merchants' & B. Ins. Co.,* 102 Iowa, 303, 71 N. W., 354.

As noted in *Taylor* v. *Grand Lodge A. O. U. W.,* 105 N. W., 408, the case of *Schreiber* v. *German-American Hail Ins. Co.,* 43 Minn., 367, 45 N. W., 708, is not an authority for the rule that the mere retention of the premium paid before notice of a breach of condition is conclusive evidence of an election to treat the policy as valid. Neither do the cases incidentally referred to by Chief Justice GILFILLAN in that case sustain this proposition. In *Fishbeck* v. *Phenix Ins. Co.,* 54 Cal., 422, there was present every element of a technical estoppel. The point is not decided in *Harris* v. *Equitable Life Assurance Soc.,* 64 N. Y., 196. In *Baker* v. *New York Life Ins. Co.,* 77 Fed., 550, it appeared that the insurance company for a full year after knowledge of all the facts treated the policy as in force. *Jones* v. *Ins. Co. of N. A.,* 90 Tenn., 604, 25 Am. St. Rep., 706, 18 S. W., 260, was an action by the insured to recover the premiums. See comment upon these cases, and *Home Mut. Life Ass'n* v. *Riel,* 1 Monaghan (Pa.), 615, 17 Atl., 36; *Georgia Home Ins. Co.* v. *Rosenfield,* 37 C. C. A., 96, 95 Fed., 358, 361. In some states statutes have been en-

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acted which require an insurance company to return all premiums which it has received, as a condition precedent to interposing a defense on the ground that the policy was obtained by misrepresentations. Mo. Rev. Stat., 1879, sec. 5977; *New York Life Ins. Co.* v. *Fletcher,* 117 U. S., 519, 29 L. Ed., 934, 6 Sup. Ct. Rep., 837; Cal. Civ. Code, § 2617; and Va. Acts 1897, 1898, ch. 601, p. (Va. Code 1904, p. 638); *Virginia F. & M. Ins. Co.* v. *Cummings* (Texas Civ. App.), 78 S. W., 716; and *Metropolitan L. Ins. Co.* v. *Moore,* 117 Ky., 651, 79 S. W., 219, sustain the appellant's contention; but they rest upon what seems to us an erroneous theory. The rule there applied would be properly applicable in an action by an insurance company against the insured for the purpose of having the contract rescinded.

Neither is appellant's contention sustained by *Mississippi Home Ins. Co.* v. *Dobbins,* 81 Miss., 623, 33 South., 504. In that case the premium was paid after the agent of the company had notice of the loss; and after the notice of additional insurance the company furnished blanks and allowed the insured to make proofs of loss. It was held that, under the circumstances and under the terms of the policy with reference to the return of premiums upon cancellation of the policy, the company was estopped by its failure to return the unearned premium. *Commercial Assur. Co.* v. *New Jersey Rubber Co.,* 61 N. J. Eq., 446, 49 Atl., 155, was a suit by the insurer to cancel the policy.

In this case the insurer is not asking to have the contract rescinded. The premium came into its possession lawfully under color of what was assumed to be a valid contract, and it cannot be properly placed in a position of withholding it until payment has been demanded. *American Mut. L. Ins. Co.* v. *Bertram,* 163 Ind., 51, 64 L. R. A., 935, 70 N. E., 258.

We submit that the words, "become void or ceased," in the policy do not cover cases in which the policy is avoided by a breach on the part of the assured. There are many things

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named in the policy wholly beyond the control of the assured upon the happenings of which the policy becomes void or ceases, *i. e.*, "a change in the interest, title or ownership of the subject of insurance, whether by legal process or judgment, or by the voluntary act of the assured or otherwise, or if with knowledge of the assured foreclosure proceedings be commenced, or notice given of the sale of any property covered by the policy, by virtue of any deed of trust or mortgage, or if any building, or any part thereof, fall, except as the result of fire." "When by reason of any of these things the policy becomes void or ceases, it is but just that the unearned premium be returned, for the assured does not by his own act bring about such conditions. But there is no reason, in law or morals, why any part of the premium should be returned when the policy is rendered void by the voluntary act of the assured. Such construction would carry the right to a return of a part of the premium even in the case specified in the policy of "false swearing by the assured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss." *Colby* v. *Ins. Co.*, 66 Iowa, 577. Such provisions are self-executing provisions. *Barry* v. *Order of Catholic Knights,* 119 Wis., 362. *Perry* v. *Ins. Co.*, 132 N. C., 283.

The iron safe clause is declared a reasonable one by the courts. But whether it be or not, it is one the parties have agreed on. It is part of the standard New York policy, and the appellant was required by the statute law of Louisiana to use that form in all of its contracts made in that state. It was one of the terms of the contract, and one of the conditions on which the insurer agreed to be bound. The assured agreed to porform its stipulations, and in event of failing so to do, that the policy as a contract of insurance should end. If it be held by the court, that notwithstanding the voluntary breach of the contract by the assured, he was under the circumstances entitled to a return of any part of the premium, he

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must, surely, at least bring himself within the conditions upon which such return could be claimed.

We have thus far argued this case as though the contract had been made in this state, and as if this court would adopt its own view of the construction of the policy, uninfluenced by the decisions of any particular state.

We come now to look at the question from a consideration of the policies as Louisiana contracts. The contracts were not only Louisiana contracts, made in Louisiana, insuring property situated there, to be fully performed there, but they were contracts made under the operation and control of the statutes of that state, which statutes entered into these contracts as though they were written into the policies. Whatever constructions, therefore, have been put upon such policies by the courts of that state, it is submitted are of controlling influence, and especially if they were made before these policies were written.

It seems that the supreme court of Louisiana has not had presented to it the precise question which controls in this case. But the appellate court of that state has expressly ruled upon the question in an opinion delivered by Judge PUGH in the case of *William Harper* v. *American Fire Ins. Co.*, as yet unreported. It is in that case expressly held that no return of the unearned premium is required to enable the insurer to rely upon the forfeiture.

The statute of Louisiana under the operation of which the policies sued on were written, was enacted in 1898, and it prohibits fire insurance companies doing business in that state from issuing "policies on property in this state other than those which shall conform to the requirements of the New York standard form of fire insurance policies." Act No. 105, p. 151, 1898, sec. 22. The power of the legislature to enact such a statute is undoubted. But it is so essentially an exercise of legislative power, that it cannot be delegated. *Dowling* v. *Lancashire Co.*, 92 Wis., 63, 31 L. R. A., 112. To the

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same effect are: *Anderson* v. *Manchester Fire Ins. Co.,* 59 Minn., 182, 28 L. R. A., 609; *Oneil* v. *Am. Fire Ins. Co.,* 166 Pa. St., 72, 26 L. R. A., 715. We have then a contract entered into between the parties; but its form, substance and meaning, depending, not upon what the parties intended, but upon what the legislature intended by the statute it enacted.

To say that a contract made in Louisiana under this statute, is to be construed under general laws applicable to agreements made by parties permitted to contract as they may choose, and that the courts of any one of the states in which a suit may be brought, can substitute their judgments, for that of those of the state in which the contract is made, would be to produce incalculable confusion. The assured who has the choice of the forum, would, when he had determined to sue, begin to inquire, not what the courts of the *loci contractus* had or would decide; but what court had by its opinions evidenced views more favorable to him. Because, as we may assume that the appellee realized that he could not recover in a suit brought on these policies in Louisiana, where the contracts were made, he has come into this state, hoping to leave behind him the statutes under which the contracts were made, and the decisions of the courts of that state construing such policies. If the decisions of the courts of this state had in his opinion, not been favorable to the contentions he makes, and those of Arkansas or Missouri, of Washington or of Maine, had promised success, he would have elected to sue in that state and not in this. But this court will not ignore the Louisiana statute. *Shaw* v. *Postal Tel. Co.,* 79 Miss., 670, s.c., 31 South., 222. Every stipulation and provision of the policy is controlled and imposed by the Louisiana statute.

The supreme court of Louisiana has uniformly held that a breach of the iron safe clause renders the policy void. 48 Ann., 223; 36 Am., 660; 41 Ann., 31; 52 Ann., 775.

The authorities are divided upon the question whether in a policy which insures property to which the iron safe clause

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is applicable, and also other property, which by reason of its nature is not controlled thereby (as fixtures or a building), and the policy provides that a breach of the clause shall render the insurance void, the stipulation is divisible, or indivisible. In this state it is held that the insurance is divisible, and that a breach of the iron safe clause avoids the policy only as to the property to which it is applicable. *Insurance Co.* v. *The Bank,* 71 Mass., 608, s.c., 15, South, 392; *Mitchell* v. *Ins. Co.,* 72 Miss., 53, s.c., 18 South., 86.

But the supreme court of Louisiana takes the other view, and holds that a breach of the clause avoids the policy *in toto. St. Landry Co.* v. *Ins. Co.,* 38 South. Rep., 87.

The question is not one of procedure, and therefore to be governed by the law of the forum, but it is one going to the substance and meaning of the contract, and is of course controlled by the *lex loci contractus.*

J. Lemkowitz, Alexander & Alexander, and *George B. Power,* for appellee.

In behalf of appellee, our propositions are as follows:

1st. This case falls squarely within *Mississippi Fire Association* v. *Dobbins,* 81 Miss., 630, 33 South., 504, and the failure to return or tender the unearned premium before suit brought must be treated as violation of the express provision of the policy and a waiver of the forfeiture if there had been a forfeiture.

2d. No question of a Louisiana statute or of a Louisiana law is involved. Louisiana has no statute relative to the duty of tendering back the premium, nor has the question here presented been decided by the supreme court of Louisiana. Even if that court had construed it, this court, on the general law, such as waiver or estoppel, or the construction of a private contract, will be controlled by its own views of what is a proper construction.

3d. If the court should overrule *Mississippi Fire Associa-*

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tion v. *Dobbins,* or should hold for any reason that the tender was unnecessary, we still say that there was a substantial compliance with the iron safe clause.

4th. There has never yet been a lawful tender. The payment into court was too late and was in full satisfaction of all the policies. In fact, one of the policies covered a loss on fixtures and to this the iron safe clause has no reference; and one of the policies in the Ætna, viz., for $900, was not issued until March 5, 1905, and the only irregularity complained of in the books was prior to January 1, 1905. The agreement as to the keeping of books was prospective, and after the issuance of this policy it is not even claimed that there was any failure of duty. Yet the tender was on condition of surrendering all of the policies, including this policy and the policy covering the fixtures.

1. The cases discussed in appellant's brief do not involve the clause in question which is contained in the New York standard form of policies, but they go off on questions as to what acts on the part of the insured amount to an estoppel or waiver under the general law. These cases might be pertinent if the question presented were whether the facts in this case bring it within *Mississippi Home Insurance Company* v. *Dobbins* instead of *Mississippi Fire Association* v. *Dobbins.* Those two cases were considered together by this court, and decided together. In the former case, the court commented on the inapplicablity of the argument which proceeded upon the assumption that the case presented nothing more than a mere retention of the premium by the company. Waiving that question, the court held that the company was estopped to set up the forfeiture because of the acts of the agent after fire, and after he knew of the loss, the failure promptly to disavow liability under the circumstances amounting to an estoppel. The natural result of the agent's silence and non-action was that Dobbins had to proceed on the idea that the proofs of loss were necessary and he was put to the trouble of making the

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proofs of loss, and the court held with the Kentucky court and other courts that when the insurer learned of the forfeiture, even where there was no agreement in respect to the return of the premium, it was bound to either assent or cancel, and failing to do either it will be treated as having assented. On the other hand, in the case of *Mississippi Fire Association* v. *Dobbins* case, the court, confronted by the standard policy found that the duty of the company on learning of the breach not only arose under the general law and as a matter of honesty and fairness, but arose under a special provision of the contract to the effect that if the policy should become void the unearned portion of the premium should be returned. It is true that in the latter case the evidence left it uncertain whether the agent collected the premium from Dobbins after the fire and after he knew of the other insurance. Had the evidence on this point been certain, the court might well have put its decision on the ground that acceptance of the premium after knowledge of the breach was itself a waiver; but, the court did not rest its decision on that point. It could not well have done so, because there was no instruction touching the question and the case was tried without a jury. However that may be, this court disposes of the case by citing the express provision of the contract and declaring, "that the appellant, instead of conforming to the terms of the contract, says the policy is void and yet holds on to all of the premiums."

While the pleadings presented squarely the question decided in *Mississippi Fire Association* v. *Dobbins,* yet under the general traverses testimony was taken and what transpired after the loss was shown, and we submit confidently that under that evidence the peremptory instruction was proper, even if *Mississippi Fire Association* v. *Dobbins* had not been decided, for the facts bring the case within *Mississippi Home Insurance Company* v. *Dobbins.*

It will be seen that most of the cases reviewed by appellants in their brief were those in which the knowledge of the breach

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was received by the agent or the company before the fire, and we readily concede that most of the cases cited can be differentiated on the facts from both the *Dobbins cases* in that respect; but, we deny that there is any essential difference of principle involved where the knowledge of the breach comes before the fire and where it received afterwards during the adjustment. There may be a stronger reason for applying the rule where the knowledge is acquired before the fire, but the principle invoked to sustain the waiver is the same in both instances.

It is very generally held that, although policies of insurance prescribe that upon certain breaches of conditions the policy shall be void, they become merely voidable; our courts have time and again recognized this rule, and, in *Mississippi Home Insurance Company* v. *Dobbins,* cites with approval the Minnesota decision which held, that the breach of the condition did not make the policies absolutely void, but that they were void only at the *election* of the defendant which might waive the breach of the condition.

In 3 Cooley, Briefs on Insurance, p. 2690 (d), that author after discussing the rule which was sanctioned in *Mississippi Home Insurance Company* v. *Dobbins,* proceeds to the proposition involving the mere retention after loss with the knowledge of the breach, says: "Some cases hold that the retention after loss with knowledge then first obtained of a forfeiture or avoidance of a premium or assessment unearned at the time of such forfeiture or avoidance, may operate as a waiver of the defense the same as though the money had been originally accepted with such knowledge." The author cites many cases, among others *Schreiber* v. *German American Hail Insurance Co.,* 43 Minn., 367, which our court cited in *Mississippi Fire Association* v. *Dobbins.* This author, Cooley, then proceeds to state as follows: "Other cases proceed on the line that the rights of the parties are fixed by the loss and if insured was not entitled to recover, then mere retention of the premium does not

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give the right," citing a case in Iowa and North Dakota and two decisions of inferior courts elsewhere.

Very many of the cases cited by appellant are those in which the inquiry of the court was whether there was an intentional concealment of a defense or whether the insured was misled and prejudiced. We have shown however that *Mississippi Fire Association* v. *Dobbins* was not decided solely on the doctrine of estoppel, but on waiver based on nonperformance by the company of an expressed stipulation; but, even where no such stipulation is involved the best considered cases now put the denial of the right to avail of the forfeiture on broader grounds.

Counsel for appellants proceeding on the erroneous postulate that this case is controlled by the first case of *Mississippi Home Insurance Company* v. *Dobbins* review and attempt to distinguish all of the cases referred to in the opinion in that case. They seem to forget that that case might be ignored or conceded to be erroneous, and yet this case fall squarely within *Mississippi Fire Association* v. *Dobbins;* but both cases are right in principle and on authority. Notwithstanding the numerous cases cited by appellant, we state with confidence that not one of them is an authority for the proposition that under a standard policy containing the clause in question in this case the company after knowledge of the breach can refuse to perform the obligation imposed on it by withholding the premium, and not insist on the forfeiture.

2. On our next proposition, as there is no question of conflict of laws involved, little need be said. Counsel for appellant must concede that the supreme court of Louisiana has never decided the question whether under a policy like this and under facts like these the company can avail of a forfeiture when it retains the premium.

Mount is a citizen of Mississippi, the companies are domiciled in northern states, and the property insured happened to be in Louisiana, where the policies were written and delivered. It is useless to inquire whether this makes the contract a Louis-

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iana contract or not, for it is conceded that there is nothing peculiar about the Louisiana law. The court is not being called on to construe any Louisiana statute. The ingenious argument of appellant that since the Louisiana statute provides the form of the contract, the construction of the contract becomes the construction of the statute, is not tenable. "The fact that the standard policy is prescribed by statute does not change its character as a contract. It is put forward by the legislature as a contract to be entered into by the parties and to derive its validity from their consent." 1 Cooley's Briefs on Insurance, 531, citing *Chichester* v. *N. H. Co.,* 74 Conn., 510; *Reed* v. *Wash. Co.,* 138 Mass., 572.

Certainly the fact that the legislature prescribes a form which the parties may or may not adopt as a contract does not make the liability of either statutory; it is still contractual. It is useless to try to forecast what the Louisiana supreme court will hold when the question is presented. If we are to judge from its opinions on analogous and cognate questions, we would conclude that it would line up with this court and others holding with it. The Louisiana court has expressly decided that where the agent of an insurance company accepts a premium after knowledge of the forfeiture or avoidance, the company waives the breach. *Union Nat. Bank* v. *Manhattan,* 52 La. Ann., 36.

If the law of any state is to be looked to as controlling, it would seem to be the law of New York, for Louisiana in 1898 adopted the standard form of policy prescribed by the legislature of New York, and it will be assumed that if the form of policy is to be treated as a statute Louisiana adopted it with the construction given it by the New York courts. The New York courts have uniformly held with the courts of other states that companies must act with perfect good faith with the collections and retentions of premiums or they will be held to waive the forfeitures. See Cooley's Briefs on Insurance, vol. 3, 2684.

3. Our next proposition is that the evidence shows that there was a substantial compliance with the iron safe clause. It is

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too well settled to need the citation of authority that substantial compliance of the iron safe clause is all that is required. The decisions of our court clearly hold or imply that that is the rule. Our court has held that the clause does not apply to books kept previous to the policy. *Ins. Co. v. Sheffy,* 71 Miss., 919, s.c., 16 South., 307. The same has been held in Louisiana. See *Richard* v. *Springfield Ins. Co.,* 114 La., 794.

The accidental failure to place a book containing part of an inventory in a safe is not fatal where the total has been carried into the ledger; and duplicate invoices have been held to be a sufficient substitute for an inventory accidentally left out of the safe and destroyed. Cooley's Briefs on Insurance, page 1828, citing *Merchant's Nat. Ins. Co.* v. *Dunbar,* 88 Ill. App., 575, and *McNutt* v. *Va. Fire Ins. Co.* (Tenn.), 45 S. W., 61; see also, as to loss of invoices, *Continental Fire Ins. Co.* v. *Cummings,* 78 S. W. Tex., 378; *Ins. Co.* v. *Cummings, Ib.,* 716.

4. Our next proposition is that the tender as finally made was insufficient.

Counsel for appellants unnecessarily cite many authorities to support the elementary proposition that a tender is unnecessary when by the acts or words of the party entitled to the payment the debtor is misled into not making it but none of the authorities cited go to the case where there has been nothing said or done to prevent a tender or to intimate whether it would be accepted or rejected.

The contention that there was no duty to return the premium because insured had not first surrendered the policy is without merit.

Argued orally by *Tim E. Cooper,* for appellant and *C. H. Alexander,* for appellee.

MAYES, J., delivered the opinion of the court.

The controversy in this case is as to policies No. 3,694 for the sum of $1,000, and No. 3,786 for $1,750, covering a stock of

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merchandise owned by appellee. It was conceded in the argument of this case, by counsel representing appellant, that the other policy mentioned in this record, No. 4,050, is not in controversy, and therefore what we say only applies to the two policies in question.

The first question which we consider is: Was there a breach of the iron safe clause contained in the policy? The policy of insurance contained the following clause with reference to that subject, viz.:

"(1) The assured will take a complete itemized inventory of stock on hand once in each calendar year, and, unless such intentory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

(2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy.

(3) The assured will keep such books and inventory—and also the last preceding inventory, if such has been taken—securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or, failing in this, the assured will keep such books and inventory in some place not exposed to a fire which would destroy the aforesaid building; and unless such books and inventories are produced and delivered to this company for examination, after loss or damage by fire to the personal property insured hereunder, this policy shall be null and void, and no suit or action shall be maintained hereon. It is further agreed that the receipt of such books and inventories and the exami-

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nation of same shall not be an admission of any liability under this policy, nor a waiver of any defense to the same."

By the above clause the insured is required by the contract to "keep a set of books, which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments, both for cash and credit, from the date of inventory, as provided for in first section of this clause." The insurance under policy No. 3,694, was effected about the 1st of July, 1904, and the inventory is claimed to have been taken about the 1st of August of the same year. By the terms of the contract it became the duty of the insured to keep a set of books, presenting a complete record of business transacted, including all purchases, sales, and shipments, from the date the inventory is required to be taken, or through the life of the policy. There was a change of bookkeepers about the 1st of January, 1905, and a change in the method of keeping the books from a double entry to a single entry. When this change in the system of keeping books was made, the books kept prior to January 1, 1905, were footed up, and the aggregate amount of the footings of the old books, showing the purchases, sales, shipments, etc., brought forward and placed in the new books, so that the new books only contained the footings of the amount shown by the old books. From January 1, 1905, to the date of the fire, these new books containing these footings seem to have been kept down to the date of the fire, together with the inventory taken on the 1st of August, and were kept in the iron safe and produced after the fire. The old books were placed on top of the safe, and when the fire occurred they were burned, so that when the adjuster reached the premises the only books that were produced were the books kept from January 1, 1905, containing the footings brought forward from the books kept from July, 1904, to January, 1905. It is not a matter of dispute that the books kept from the date of the issuance of the policy to the 1st of January were not kept in the safe and were destroyed

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in the fire. We think, under these facts, there was no compliance with the iron safe clause. The reasonable enforcement of iron safe clause in insurance policies has been universally upheld by the courts. Indeed, to prevent fraud, and for protection of the rights of insurance companies, some such clause seems necessary.

This case presents on its face quite a different case from that of *Insurance Co.* v. *Sheffy*, 71 Miss., 919, 16 South., 307. In the *Sheffy case* the court said: "The evidence shows very clearly that the application of the insured for the policy in suit was completed and signed, and the policy delivered, not earlier than the 17th day of December, 1892. We may properly assume, so far as the rights of the insurer are affected by the date of the contract, that it was actually made on the day named. On that very day the insured took a new inventory of his stock of goods, and this last inventory, as well as the two preceding ones, dated, respectively, September 17, 1892, and December 17, 1891, were kept in the iron safe, and were produced after the loss. On the 17th day of December, 1892, the insured opened a new set of books, transferred to them all the footings or balances from his old books, and thereafter, from said 17th day of December, entered fully in the new set of books itemized statements of every transaction occurring in the conduct of the business. The forfeiture under the iron safe clause is, by the appellant, contended for because of the failure of the appellee to keep in the iron safe the old books, showing the itemized statements of the transactions antedating the policy sued on, and to produce them after the loss occurred. Why these old books of account were not kept in the safe, but were left outside and consumed in the fire which occasioned the loss is made clear by the evidence. It is perfectly apparent that the insured did exactly what this iron safe clause required him to do. This clause made it obligatory upon him to keep a set of books showing a record of business transacted, including all purchases and sales, both for cash and credit, and

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to keep the inventory and books securely locked in a fireproof safe, and this condition the insured fully complied with. His duty was to show a set of books showing a record of business thereafter transacted, including future purchases and sales. He did not consent to preserve indefinitely his old books, showing all the past transactions. So far as this contention may be concerned, it was immaterial whether he had any books of account antedating the policy. He had his inventory, showing the amount of stock he had when the policy was issued, and he was to keep a record of his future business transactions, with a view of disclosing, when necessary, when and where and how the stock went. We repeat, the duty laid upon him was prospective, and he fully met it." The decision in the *Sheffy case, supra,* will readily be distinguished from the facts presented by this case. Mount did not keep a record of his books prospectively, such as were required by the iron safe clause. From the date of the issuance of the insurance up to January, 1905, the books covering that period having been destroyed by fire, it was impossible for the insurance company to tell anything about the condition of the stock of goods, except from the balances brought forward and placed in the new books. There was no record kept during that time of sales, purchases, and shipments, as is required by the clause of the insurance policy referred to.

We come, now, to the next question involved: When there has been a forfeiture under the policy, known to the insurance company only after loss, and no act done by the insurance company which could mislead the insured in any way, or occasion him any inconvenience or trouble, and the insurance company has done nothing to waive its rights, either impliedly or expressly, except merely fail to return the unearned premium, will this single fact be considered as a waiver of the breach? The particular clause of the policy involving this question is as follows, viz.: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as here-

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inbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the *pro rata* premium." It is contended by appellee that a mere failure to return or offer to return the unearned premium, after loss has occurred and denial of liability on the part of the company, because of a breach of the conditions of the policy by the insured, will constitute a waiver on the part of the company to claim the forfeiture; and in support of this proposition appellee cites the *Dobbins cases* in 81 Miss., 623, 33 South., 504, and 81 Miss., 630, 33 South., 506. We do not understand that this court has ever held, in any case, that the mere fact of the failure of the insurance company to return the unearned premium after a loss has occurred, and until there has been a demand made upon it by the insured for this unearned premium and an offer to surrender the policy, will in itself, unaccompanied by any other fact, constitute a waiver of the forfeiture. In the case of *Dobbins* v. *Insurance Co.*, 81 Miss., 623, 33 South., 504, the court said: "The facts show that the fire occurred on the 23d of October. Dobbins notified the agent, Montague, on the 24th. Without knowledge at that time of the additional insurance, but six hours thereafter, on the same day, when there had been no change whatever in the condition of the parties, he was fully informed of the additional insurance. The insured, Dobbins, lived in the same town within a few minutes' easy communication. After full knowledge, on the 25th, of the other insurance, the agent had another conversation with Dobbins, in which he told him that the policy had been forfeited on account of the additional insurance, but that he would report the matter to the company; and, more than that, when Dobbins came to get blank proofs to make proof of loss, he furnished them. He furnished them, of course, for proofs to be made. There would have been no

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sense in the act otherwise. Furthermore, he testifies himself that he had power to cancel the policy, and was under no necessity to send it to the company for cancellation. The policy had been in force about one month. The insured had paid the premium for three years. No portion of the unearned premium was returned or offered to be returned." And the court, under these facts, because of the acts and conduct of the agent acting for the company, held that the insurance company was estopped to set up the forfeiture. It will be seen in this case that the question presented was not the single question of whether or not the mere retention of the premium by the company estopped the company from setting up the forfeiture on that ground. The decision is based upon the acts and conduct of the agent, and holds that under the facts in the case his acts and conduct estopped the insurance company to set up the forfeiture. In the second case of *Fire Ass'n* v. *Dobbins,* 81 Miss., 630, 33 South., 506, Dobbins sued the insurance company, and it defended on the ground that he had taken out other insurance on the same property, subsequent to taking out the policy sued on, without the knowledge and consent of the defendant company, and in violation of the terms of the contract of insurance which rendered the policy sued on void. In this case there was a conflict of testimony, and the case was tried before the court without a jury; both parties waiving a jury. The evidence for defendant was that the policy sued on was issued in July, 1901, and the premium paid to the company on September 1, 1901, by the local agents, and the fire occurred October 23, 1901, and plaintiff came into the office of the local agents October 24th, the next day after the fire, and notified them of the fire, when he was told that the premium due had not been paid by him. The premium was then paid to the local agents, and for the first time the agents found out that Dobbins had another policy on the same property; the agent testifying that he did not recollect whether it was before or after the premium was paid that Dobbins informed him of

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the existence of the other policy. The agent also testified that he then told Dobbins that the taking out of the other policy avoided the policy sued on, but that he would send in the report of it to the company. On the other hand, the plaintiff testified that he informed the local agents of the fire on the 24th of October, and then informed them of the other policy, and went back the next day and paid the premium and got a receipt. The insurance company never returned or offered to return any part of the premium. On these facts, there being a conflict in the evidence, the plaintiff claiming that he informed the local agents of the fire on the 24th of October, and that he then informed them of the other policy, about which they made no objections so far as the facts show, and after notifying them of the loss, and informing them of the other policy, went back the next day and paid the premium and got a receipt, and still, though the insurance company under these facts declared the policy forfeited, it did not offer to return the premium, the court said, because the insurance company held onto the premiums with full knowledge of the loss, having taken the premiums after the loss, it could not set up the forfeiture.

We do not think that either one of the cases in 81 Miss., and 33 South., holds, or intended to hold, that the mere fact, unaccompanied by any other circumstances, where knowledge comes long after the premiums are paid and the insurance effected and loss occurs, and when the only contest that exists between the parties is as to liability under the policy, that the insurance company does not offer to return the unearned premiums will estop it from claiming the forfeiture; nor do we find any other case that holds this. In both the *Dobbins cases* it clearly appears that the insurance company had done something affirmatively changing the condition of the insured, and thereby creating an estoppel on the part of the insurance company to claim the forfeiture. In both those cases premiums were received by the insurance company after the loss had oc-

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curred, and when it was manifest that the company knew of the loss, or knew such facts and circumstances as would bind it with knowledge. No such case is presented here. The premiums in this case were paid at the time the policies were issued, and the breach of condition was not discovered until after the loss had occurred. The insurance company denied liability as soon as the adjuster reached the place where the loss occurred. In this case, under its facts, it was not necessary for the insurance company to tender the unearned premium until there was a demand made upon it for same and an offer on part of insured to surrender the policy. No demand having ever been made for the unearned premium, and no offer having ever been made to surrender the policy, the insurance company had a right to wait for this. When it was sued on the policy by the insured for its full amount, it had a right to rely upon the breach of the iron safe clause, and plead it, and then and there tender with their plea the unearned portion of the premium; and this delay, under the facts in this record, created no waiver or estoppel. If they denied liability as to all the policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was nevertheless good as to that policy on which they were not liable. It was the duty of appellees to accept such part of the tender as appellants could lawfully make. Policy No. 3,786 is not invalidated as to that part of it which covers fixtures in the store, but is invalidated only to the extent that it covers the stock of goods. See *Mitchell* v. *Insurance Co.*, 72 Miss., 53, 18 South., 86, 48 Am. St. Rep., 535.

Reversed and remanded.

SUGGESTION OF ERROR.

After the rendition of the foregoing opinion the appellant company filed a suggestion of error asking for a reconsideration of the decision in so far as the court held that the policies should not be invalidated as to such parts as covered the fur-

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niture and fixtures in the store building; appellant suggesting that the policies should be invalidated *in toto;* that, although the court had held, in *Mitchell* v. *Insurance Company,* 72 Miss., 53, 18 South. Rep., 86, that policies such as these in controversy, when issued and delivered in Mississippi were divisible as to goods and fixtures, yet the law in Louisiana, as shown in the case of *St. Landry* v. *Insurance Company,* was different, the Louisiana supreme court, in that case, having held that such policies were entire and indivisible; and that, as the policies in controversy were issued and delivered to the appellee in Louisiana the Louisiana law should govern.

In response to which suggestion of error,

MAYES, J., delivered the following supplemental opinion:

It appearing on suggestion of error that the policies of insurance sued on were made in the state of Louisiana, it is the opinion of the court that the judgment should be modified, so as to invalidate that part of policies No. 3,786 and No. 4,050, covering the fixtures in the store, as well as that part which covers the stock of goods, in conformity to the decision of the Louisiana courts upon this subject. The case of *Mitchell* v. *Insurance Company,* 72 Miss., 53, 18 South., 86, 48 Am. St. Rep., 535, is not applicable here, since the contract of insurance is a Louisiana contract, merely brought into this state for purposes of suit; the Louisiana courts having held contrary to the *Mitchell case, supra.*

To the extent indicated in this opinion, the suggestion of error is sustained.

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Statement of the case

AUGUSTA W. WALL ET AL. v. JOHN W. HARRIS.

[44 South., 36.]

EQUITY. *Injunction. Action at law. Unconscionable advantage. Deed of trust. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred by the statute of limitations.

FROM the chancery court of Marshall county.

HON. JULIAN C. WILSON, Chancellor.

Harris, appellee, was complainant in the court below; Mrs. Wall and others, appellants, were defendants there. The demurrer of defendants to the bill of complaint was overruled and they appealed from the decree overruling it to the supreme court.

Smith & Totten, for appellants.

The remedy on mortgages is barred when the debt is barred. Code 1906, § 3093; Code 1892, § 2733.

The indebtedness secured by the deed of trust being an ordinary promissory note, the statute of limitations of six years applied to it. The note was given on the 1st day of January, 1892, and became barred on the 4th day of January, 1899.

The sale being void, and appellee being barred, he holds the land as a trespasser, pure and simple.

The statute of limitation of ten years' adverse possession began to run in appellee's favor on the 1st day of January, 1898, and continued thus to run until the bringing of the ejectment suit against him, a period of less than ten years.

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Statement of the case.

Now, had the statute of ten years become complete in favor of appellee, before the bringing of this suit, then the sore on appellee's title would have healed, and his title have become perfected; but on January 1, 1899, his right of action on the note became barred. Had the ten years' statute applied, then the right of these appellants would have been lost, and we desire to ask if the law is more tender in enforcing one statute of limitations than another. Are not appellants' rights to the benefit of the six ears' statute of limitation as equitable, when it has matured, as would be appellee's right to quiet title under the ten years' statute of limitation, if the same had matured?

If appellee, without any pretense of right, had gone into the possession of appellant's land and held for ten years adversely, his title would have become absolute by the *vis major* of the statute. This way of acquiring title has no equity with it, but it is in accordance with the statute. Will the law permit appellant to put in motion a statute of limitation in his favor, and not hold him responsive to the statute that runs against him at the same time? Is it right to allow the statute to run in his favor and to stay the effect of the statute that runs against him?

A *cestui que trust* cannot by law become a mortgagee in possession. Jones on Mortgages, sec. 719. Certain circumstances may, however, occur whereby the law may treat him as such; but it can only arise out of the peculiar conditions of facts in a given case, by applying the doctrine of estoppel upon facts justifying the same. There is nothing in this case to give place to the doctrine of estoppel. The learned chancellor in the court below based his decision in this case on the case of *Lucas* v. *Mortgage Co.*, 72 Miss., 366, s.c., 16, South., 358. The facts in this case are entirely different. Here the pretended sale was made on the 4th day of September, 1897, ignoring the requirements of chapter 96, Laws 1896, regarding sales by substituted trustees under deeds of trust. The appointment of the substituted trustee not having been spread at

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large upon the records, or by separate instruments recorded, etc. This statute renders that sale void, and Code 1906, § 2773 (being Laws 1896, ch. 96, brought forward), denounces it as absolutely null and void, both at law and in equity.

In conclusion, we submit that appellee knew or should have known from the first that he acquired no title to the land under the sale. It was his act in procuring the illegal sale, and he was alone responsible for the nature of the title that he got thereunder; and he should not now be heard in an attempt to make valid his illegal taking of appellants' property, in open violation of the statute.

Again, we submit, that while at common law the legal estate vested in the mortgagee, and was forfeited upon default of payment of the indebtedness thereby secured, our statute has changed this, and the mortgagor is deemed the owner of the legal title, and when the debt is barred, the remedy in equity on the mortgage is likewise barred. Code 1892, § 2733, Code 1906, § 3093.

Further, it would be unjust to appellants in this case to apply the doctrine of a mortgagee in possession, as appellee has never, since he took possession of the land, recognized that he held the same in trust for the appellants, as is the case required of mortgagees in possession. Jones on Mortgages, sec. 10.

Mayes & Longstreet, for appellee.

The demurrer raises two questions: 1. Whether the statute of limitations runs against the debt to a mortgagee in possession, and 2, whether, even if so, the right to have a foreclosure sale by judicial decree is, in Mississippi, always barred when the debt secured is barred by the statute of limitations, or, whether under circumstances where an actual or constructive fraud would be thereby effected, the defendants may not be eqitably estopped to set up the bar.

It is well settled that a mortgagee who obtains possession

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Brief for appellee.

peaceably, will not be dispossessed until the debt is fully paid; and this principle is not to be avoided by the fact that the personal liability on the debt is barred. "The mortgagee may maintain such possession against the mortgagor and every person claiming under him subsequent to the mortgage, subject to be defeated only by the payment of this debt." *Cook* v. *Cooper,* 18 Ore., 142. See also, *Helm* v. *Yerger,* 61 Miss., 44–51; *Den* v. *Wright,* 7 N. J. Law, 175; *Frank* v. *LeRoy,* 49 Calif., 314; *Spect* v. *Spect,* 13 L. R. A., 137; *Fountain* v. *Brooks Strader,* 141 Ill., 461.

The question here is not as to the right of a mortgagee out of possession to have judicial foreclosure; but the different question of whether the statute runs at all against the right to proceed *in rem* while the mortgagee is rightfully in possession. We submit that it does not. The peaceable possession by the mortgagee is analogous to the filing of a bill for foreclosure, so far as the running of the statute of limitations is concerned, and suspends it as in the case of the filing of a bill. *McDonald* v. *Vinson,* 56 Miss., 497.

Code 1892, § 2733, relied on by appellants, does not govern this case, but has relation to the independent remedies of a mortgagee out of possession; and its whole purpose is clearly expressed in its final clause, that " in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred." This is clearly a dealing with the old distinction between the method of judicial procedure for a judgment *in personam,* and the method for a judgment *in rem.*

In the case of *Haggart* v. *Wilczinski,* 143 Fed. Rep., 22 (74 C. C. A., 176), the United States circuit court of appeals held that our Code of 1892, § 2733, does not apply to mortgagees in possession. This case cited is almost identical in its facts with the case at bar. See also, *Allen* v. *Alliance Trust Co.,* 84 Miss., 319, s.c., 36 South., 285.

It is Code 1892, § 2732, which controls in the case of a mort-

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gagee in possession. We submit that this section should be considered in this case, in connection with Code 1892, § 2749, on the subject of when the limitation of action begins to run in a case of concealed fraud.

Even if the statute of limitations does run against the mortgagee in possession, the facts in this case would establish an estoppel against the defendants such as would place them beyond the pale of the operation of the statute. *Suggs* v. *Thrasher,* 30 Miss., 135. The mortgagors by remaining quiet and inactive, when it was incumbent upon them to declare themselves (the sale being voidable at their election, and not void), led the mortgagee into believing that they had elected to treat the sale and credit of proceeds as binding; and since the mortgagee, relying on this implied representation, and consequently, believing that his title was a good one, allowed his debt and remedy to become barred at law, equity will not permit the mortgagors to now come forward and avail themselves of a mere legal technicality to dispossess the mortgagee of the land, when to do so, would work a gross injustice and a harsh injury. *Stratton* v. *Bryant,* 55 Miss., 251.

Argued orally by *Lucius L. Mayes,* for appellee.

CALHOON, J., delivered the opinion of the court.

The appellant, Augusta W. Wall, and her husband, James M. Wall, executed their promissory note for $746 to appellee, Harris, in June, 1892, and on the same day executed a trust deed to W. G. Phillips as trustee to secure that note, which note became due on January 1, 1893, and carried interest from its date at the rate of ten per cent per annum. This note was permitted to run on unpaid until 1897, when, Phillips having refused to execute the trust, Harris, the beneficiary, appointed one Bennett as substituted trustee; but this appointment of substitution was not recorded. After due advertisement the substituted trustee, Bennett, sold the land on

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Opinion of the court.

September 4, 1897, according to the terms of the trust deed, and appellee, Harris, became the purchaser of it for $690, and his bid was duly credited on the note. On January 1 thereafter (1898) Harris took possession of the land, and continued in such possession, without dispute or interruption, for eight years, and until July, 1906, when Mrs. Wall and the heirs of her deceased husband, James M. Wall, brought ejectment against Harris, the beneficiary of the trust deed, in the circuit court, for the possession of the land and mesne profits and damages, which the declaration makes to aggregate about $1,500. Thereupon the appellee, Harris, filed his bill in chancery, which concedes that the sale by the substituted trustee was irregular under the previous decisions of this court, but states that there remained still due him on the indebtedness about $800, to which he is entitled, and that, if the ejectment suit should be permitted to proceed, he would be deprived of the possession of the land, which, as he asserts, he is, as mortgagee in possession, entitled to hold until the indebtedness is paid, notwithstanding he got possession under this irregular and invalid sale, and for an account, etc., and for final decree perpetuating the injunction and directing payment of any balance that may be due him on the note, and that they be required to pay within a time to be fixed, and upon failure to do so that the land should be decreed to be sold for the payment, and for general relief. On his prayer the appellants were enjoined from further prosecuting the ejectment suit until the hearing of the equity procedure. The appellants demurred to this bill, and their demurrer was overruled, and they appeal.

It would shock the conscience of the court if this beneficiary in peaceable possession should be required to give up the land, and appellants be permitted to hold to the same, and also to avoid payment of the debt. We regard this question as settled by a concluding paragraph of the opinion of this court in *Allen* v. *Alliance Trust Co.*, 84 Miss., 319, 36 South., 285, and by the same case, with a different party complainant,

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Syllabus.

styled *Haggard* v. *Wilczinski,* 143 Fed., 22, 74 C. C. A., 176. We apprehend that no court would permit the grantors in a trust deed, under the circumstances set forth in this bill, to stand quietly by for eight years, with the beneficiary peaceably in possession, and wait until the note which the trust deed secured became barred by limitation, and then take the land free from the obligation of any of the debt and with rents and profits. The only protection in this situation which the beneficiary had was to file a bill stopping such a claim in a law court, with the full tender to do equity in every regard. Such appeal to a court of conscience furnishes the only defensive course which the beneficiary could pursue.

Affirmed and remanded.

ROBERT A. GORDON *v.* BENJAMIN D. ANDERSON.

[44 South., 67.]

1. FRAUDULENT CONVEYANCES. *Statute of limitations. Code* 1906, §§ 3090, 3091, 3094.

The actual, adverse and continuous possession of land for ten years, claiming it as owner, will defeat a suit to set aside the occupant's deed, duly recorded for that length of time, as having been executed to defeat the creditors of his grantor.

2. SAME. *Concealed fraud.* Code 1906, § 3109. *Burden of proof.*

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim.

3. SAME. *Case.*

Where a grantee filed his deed to land for record promptly after its execution, took actual adverse possession of the land and occupied it continuously for ten years, claiming it as his own adversely to all the world, a suit by the creditors of his grantor, or those claiming under them, based on the charge that the deed to him was fraudulent as to such creditors cannot be maintained, certainly not in the absence of exceptional circumstances.

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Brief for appellant.

FROM the chancery court of Pontotoc county.

HON. JOHN Q. ROBINS, chancellor.

Anderson, appellee, was complainant in the court below; Gordon, appellant, was defendant there. From a decree partly in complainant's favor defendant appealed to the supreme court and complainant prosecuted a cross-appeal.

The facts are fully stated in the opinion of the court.

R. V. Fletcher, Brame & Brame, and *Williams & Bates,* for appellant and cross-appellees.

In view of the long lapse of time after the deed to Gordon was recorded and after proof of actual notice thereof on the part of Ezell it was incumbent on Anderson, the complainant (who purchased from Ezell only a short while before suit) to prove not only that he was ignorant of the fraud but that Ezell was ignorant of it and could not have discovered it by the exercise of reasonable diligence. *Peck* v. *Bank,* 7 L. R. A., 726, and note. There is absolutely no proof on this subject.

It is not pretended that Gordon was guilty of any affirmative act or line of conduct which would mislead or deceive the other party. Nor was there any relation of confidence which required him to make any report or to furnish information. The parties were at arm's length and so dealt with each other. The judgment creditor himself, being the aggressor, had proceeded to have the land sold under his execution nineteen years before the bill in this case was filed. He could only sell the land under execution upon the theory that the conveyance to Gordon was fraudulent and subject to be decreed void, and the record shows that he had full knowledge of his rights and took steps to enforce the same in 1886, but afterwards abandoned the matter and nothing further was done until the bill was filed in 1905, three days after Anderson appeared on the scene. It is difficult to conceive a stronger case against the application of the doctrine of concealed fraud. The established doctrine is that not only must it be shown that there was a concealed

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Brief for appellant.

fraud, but the creditor must show that it could not have been discovered by reasonable diligence on his part. *Buckner* v. *Calcote,* 28 Miss., 432; *State* v. *Furlong,* 60 Miss., 839; *Hudson* v. *Kimbrough,* 74 Miss., 341, s.c., 20 South., 885; *Jones* v. *Rogers,* 85 Miss., 802, s.c., 38 South, 742; *Thornton* v. *Natchez,* 88 Miss., 1, s.c., 41 South., 498. In the last mentioned case, referring to § 2731 of the Code, this court said:

"If we could imagine a concealed fraud, then clearly under the same section, with reasonable diligence it might have been first known or discovered, before the statute began to run. Under this section, 2731, and sections 2749–2762, we hold the bar complete. *Barkery* v. *Barrows,* 138 Mass., 578; *Elder* v. *McCloskey,* 70 Fed., 529, 17 C. C. A., 251."

Inasmuch as our position is thoroughly sustained by the decisions of this court, we hardly feel at liberty to cite other authorities, but on the general subject we refer to 19 Ency. L., pp. 250 and 251, and the many cases there cited. See also the note in *Miller* v. *Powers,* 4 L. R. A., 483.

"If it appears that the party has knowledge or information of facts sufficient to put a prudent man upon inquiry, and that he wholly neglects to make any inquiry, or having begun, fails to prosecute it in a reasonable manner, the inference of actual notice is necessary and absolute." *Peck* v. *Bank,* 7 L. R. A., 827, and numerous authorities cited, including Mississippi cases.

After long delay, necessity for complainant to allege and show clearly reasons for not proceeding earlier, see *March* v. *Whitmore,* 21 Wall., 185; *Teall* v. *Slaven,* 40 Fed., 774; and many cases there cited.

Even if we should be wrong in our contention that the right to attack the conveyance was lost by delay of nearly twenty years after the parties had notice, we deny that under the facts shown by this record there was any concealed fraud.

There is no evidence whatever of any agreement to keep the facts relating to the conveyance secret, and in truth there was no

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secrecy except in relation to the mere matters concerning the consideration of the deed. In the case of *State* v. *Furlong,* 60 Miss., 839, this court, in answer to the argument that the sheriff who was charged with fraud in that case, occupied a relation of trust and confidence, said:

"We cannot say that any relation of trust and confidence existed between him and the state. Where no such relation exists, where the reasonable diligence would have revealed, and where there has been no affirmative conduct or declaration calculated to lull suspicion, no fraudulent concealment within the meaning of the law has been made out. *Calcote* v. *Buckner,* 28 Miss., 432."

There must be some affirmative action or line of conduct to constitute a fraudulent concealment. A mere passive silence does not amount to such concealment. *Churchmen* v. *Indianapolis,* 100 Ind., 259; *Miller* v. *Powers,* 119 Iowa, 79.

There is a wide and fatal gap in complainant's case. He offered no evidence whatever to show that either he or his grantor, Ezell, were ignorant of the alleged fraud, or that it could not be discovered, or that any diligence at all was exercised. This ought to be the end of the case. *Jones* v. *Rogers,* 85 Miss., 802, s.c., 38 South., 742.

Fontaine & Fontaine, and *Thomas J. Buchanan,* for appellee and cross-appellant.

The decided weight of authority in equity is, that where relief is asked on the ground of actual fraud, especially if such fraud is concealed, time will not run in favor of the defendant until the discovery of the fraud, or until with reasonable diligence it might have been discovered. *Kimberly* v. *Lake Shore, etc., R. R. Co.,* 120 U. S., 136; and authorities cited.

And our statute provides: "In every case of concealed fraud the right of any person to bring suit in equity for the recovery of land of which he or any person through whom he claims may have been deprived by such fraud shall be deemed to have first accrued, at and not before the time which the

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fraud shall, or with reasonable diligence, might have been first shown or discovered." Code 1892, §·2731; *Thornton* v. *Natchez,* 88 Miss., 1, s.c., 41 South., 498.

To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure. *Bailey* v. *Glover,* 21 Wall. U. S., 349.

The adverse possession of defendant, Gordon, has nothing to do with the question or with the operation of this particular statute. Code 1892, § 2731. The point in the case is has complainant brought his suit within the time limited by the statute, after his cause of action accrued.

To prevent this statute from beginning to run, complainant must allege: (1) Fraud and the facts constituting it; (2) that the acts of fraud were committed by the defendant, or some one in privity with him: (3) that they were concealed from complainant by defendant or his privies; (4) that complainant did not discover, or know of this fraud over ten years before instituting his suit; (5) he must also allege and show that he exercised reasonable diligence to discover it sooner, or that he could not with reasonable diligence have discovered it sooner. 19 Am. & Eng. Ency. L., 242; 3d paragraph; *Jones* v. *Rogers,* 85 Miss., 836, s.c., 38 South., 742; *Alabama, etc., R'y Co.* v. *Thomas,* 86 Miss., 27, s.c., 38 South. 770.

All of these facts are alleged in complainant's bill in this case. And as a matter of fact the chancellor found that they had all been fully established by the testimony which was ample, which finding of the chancellor on the facts is analogous to the finding of a jury.

Argued orally by *L. Brame,* for appellant, and *T. J. Buchanan,* for appellee.

CALHOON, J., delivered the opinion of the court.

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Opinion of the court.

On February 27, 1905, Anderson filed his bill against Gordon to cancel a conveyance executed by L. J. Staten to Gordon on December 21, 1885, on the ground that it was executed with intent to defraud creditors and was a cloud on his title, which he claims to derive from a sheriff's deed made to one Ezell, his vendor, upon an execution from a law court of date December 6, 1886. Both the deed sought to be canceled and the sheriff's deed conveyed the same property, consisting of two tracts of land, one of sixty acres and the other of seventy-five acres, of which the sixty-acre tract was cultivated and the seventy-five-acre tract in woods; the two tracts being some distance apart, about a mile or less. On December 21, 1885, the date of the deed from L. J. Staten to Gordon sought to be canceled, it is admitted by the bill that L. J. Staten was in the "possession and ownership" of both tracts. The deed to Gordon was a warranty deed duly executed and acknowledged, and was put on record the day of its execution, and Gordon took actual possession of the sixty acres embraced in the deed, upon which there were some improvements, and held it and the seventy-five-acre tract under notorious claim of ownership from that time on continuously up to the date of the commencement of this suit, nineteen or twenty years. He notoriously claimed it all, and paid taxes on all of it from the date of his purchase. On February 13, 1886, execution was issued on the judgment of Ezell, levied on both tracts, and they were sold on August 2, 1886, by the sheriff, and purchased by E. J. Ezell, and the sheriff made Ezell a deed conveying both tracts, of date December 6, 1886, which deed was also recorded on the day of its execution. Now, with this possession and claim of possession by Gordon continuing until February 24, 1905, E. J. Ezell for the recited consideration of only $25 executed to Anderson a deed of conveyance of the land, and just three days after that, on February 27, 1905. Anderson filed this bill against Gordon, charging, as we have said, that the deed of L. J. Staten to him in 1885 was made

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with intent to defraud Ezell, and that the deed from Staten to Gordon "was carefully concealed and not discovered until September, 1904, and was wholly unknown either to Anderson or Ezell until after that time, after the exercise of reasonable diligence to discover the same." The bill charges that Staten was "seised and possessed" of both tracts when he made the deed to Gordon, and the answer admits this. The answer admits Staten's ownership and possession of the land, and the purchase by Gordon in 1885, and the judgment in favor of Ezell, and the sale of the land to him in 1886, but denies all fraud or concealed fraud and sets up his ownership and possession and the ten-year statute of limitations. The final decree sustained Gordon's title to the sixty-acre tract, but canceled Staten's conveyance to him as to the seventy-five-acre tract.

We approve the conclusion of the chancellor that Gordon cannot be disturbed by Anderson as to the sixty-acre tract, and affirm his decree as to that on the cross-appeal, and proceed now to consider that part of the final decree canceling the conveyance of Staten to Gordon of the seventy-five-acre tract. The law is plain that a period of ten years bars; but, in case of concealed fraud, the right to sue "shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered." The fact that the seventy-five-acre tract was woodland, and not in actual possession by Gordon, has no effect in this case on the statute of limitations, because, when Staten, the common source of title, conveyed to him, he was, as admitted, "seised and possessed" of this land. As to these litigants he was then the owner, and the law in such cases attaches possession to the title, and it went to Gordon with the conveyance, and not as in case of a mere intruder, who must be in actual occupation to invoke the statute. The deed was valid on its face, valid forever as against Staten, and voidable by his creditors only on attack seasonably made. On

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this conclusion the seventy-five acres are precisely within the ruling of the chancellor in Gordon's favor as to the sixty acres of which he was in actual occupation.

We now consider the main question, which involves both tracts, whether, conceding that Gordon's deed was made to defeat Staten's creditors, ten years elapsed before this suit, when the fraud was, "or with reasonable diligence might have been, discovered"; and this we answer without hesitation in the affirmative. To hold otherwise would be, on the facts here, a judicial repeal of a most wholesome section of the statute of limitations. It is perhaps enough to say that Ezell, who got his sheriff's deed nearly a year after Gordon's was had and recorded, and who quitclaimed nearly twenty years afterward for the pitiful sum of $25 to Anderson, who brought this speculative suit three days after, is still alive, and neither of them testifies at all, nor is there the slightest effort to show that there was no notice of the fraud, or of facts reasonably stimulative to inquiry, or of any diligence to ascertain the real situation, or that the fraud was not discovered or known more than ten years before this suit. This had to be shown, because, if known or suspected on the facts of this record, Anderson has no case. On silence these must be presumed against him and Ezell. If known, that ends the case. If not, the ignorance and diligence must be shown under the authorities. See the compilation in appellant's brief and the latest ruling here, *Jones* v. *Rogers,* 85 Miss., 802, 38 South., 742.

But, aside from what has been said, it seems only necessary to consider the salient features of this case. The defendant, Gordon, received his deed on December 21, 1885, recorded it the same day, immediately went into possession of the open land, had all assessed to him, and immediately commenced and continued to pay all the taxes on it, rented out the cleared land, and assumed every claim of ownership, which was well known to the community. Ezell's conveyance from

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the sheriff was of date nearly a year thereafter, and he put it on record in that year. The bill before us was not filed until nearly twenty years after Gordon's deed; Gordon being all the time in possession, claiming and paying taxes, while Ezell never paid nor offered to pay any of the taxes, nor are the taxes even tendered or offered to be refunded in the bill before us. It is also undoubtedly true that Ezell had actual notice of the conveyance to Gordon and afterwards had the land sold under the sheriff's deed. It is furthermore testified to without dispute that one of the witnesses applied to Ezell to buy the land from him, who declined to sell because his "papers were not fixed right," and he testifies that both Gordon and Ezell claimed the land, and "most of the people about there said Mr. Ezell had the best claim to it." It is therefore plain to us that it was a subject of neighborhood talk, and that Mr. Ezell, with full knowledge, as must be attributed to him, slept quietly for nearly twenty years, and then sold it for a song to Anderson, who brings this suit.

We refrain from discussing the authorities. The briefs of counsel are exhaustive, and we do not care to add to them.

This case is affirmed on cross-appeal, reversed on direct appeal, and decree will be entered here dismissing the bill.

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Statement of the case.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY v. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,

AND

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY v. MOBILE & OHIO RAILROAD COMPANY.

(TWO CASES.)

[44 South., 166.]

1. EMINENT DOMAIN. *Delegation of Power. Foreign Telephone Company.—Code* 1906, §§ 925, 929, 1876.

Under Code 1906, §§ 925, 929, providing that all telephone companies may set up their posts and fixtures along and across railroad tracks and exercise the power of eminent domain for the purpose of constructing new lines, a foreign telephone company has the right of eminent domain to secure a right of way along a railroad's right of way, although Code 1906, § 1876, provides that telephone companies "chartered under the laws of this state" may by condemnation acquire a right of way "across" railroads.

2. SAME. *New line. What is.*

A direct telephone line between two cities, along a route not previously occupied by the company, is a new line, within the meaning of Code 1906, § 929, empowering telephone companies to exercise the power of eminent domain for the purpose of constructing new lines, although the company has an indirect line between the same cities.

THE Yazoo and Mississippi Valley case from the chancery court of, first district, Hinds county.

HON. G. GARLAND LYELL, Chancellor.

THE Mobile and Ohio case from the chancery court of Lauderdale county.

HON. JAS. L. MCCASKILL, Chancellor.

THE YAZOO AND MISSISSIPPI VALLEY CASE.

The Yazoo & Mississippi Valley Railroad Company was complainant in the court below; the Cumberland Telephone & Telegraph Company, hereinafter called the telephone company, ap-

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Statement of the case.

pellant, was defendant there. From an interlocutory decree overruling the motion of the telephone company to dissolve a preliminary injunction, the telephone company appealed to the supreme court.

The railroad company sought by injunction to restrain the telephone company, a Kentucky corporation, from exercising the right of eminent domain under the statutes of Mississippi to expropriate a right of way for its lines along the right of way of the railroad company in Mississippi between Jackson and Natchez.

The appellee's bill alleged that the telephone company had instituted proceedings before a special court of eminent domain for the purposes stated, under Code 1906, ch. 43, entitled "Eminent Domain"; that it was a foreign corporation, not a citizen of Mississippi and not entitled to exercise the right of eminent domain under the laws of the state; that the condemnation proceeding was not prosecuted for the purpose of constructing a new line as required by Code 1906, § 929, prescribing generally that telephone companies, for the purpose of constructing new lines, shall have the right of eminent domain, since the appellant already had in operation a line of telephone over substantially the same route contemplated in the eminent domain proceedings, though not along the appellee's right of way; and that the statutes on the subject of eminent domain do not contemplate a right merely to re-locate telephone lines over the route already in use.

The answer of the telephone company admitted that it was a Kentucky corporation; denied that it had no right to exercise eminent domain proceedings under the laws of Mississippi; denied that its proposed line was over the same as its previously existing line of telephone; its answer alleged that, while it had a telephone connection between Jackson and Natchez the route was indirect, being via Vicksburg; that there were many towns in a direct line between Jackson and Natchez and on the line of the proposed route contemplated in the

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eminent domain proceedings which were at present without telephone communication, and which would be benefited by the contemplated action of the appellant; and, in short, the telephone company claimed that the route sought to be secured over the right of way of the railroad company was for a new line of telephone.

The appellant made a motion to dissolve the preliminary injunction, previously granted, and, on the hearing of the motion, offered affidavits of persons, its officers and employes, to sustain its answer.

MOBILE AND OHIO CASE.

The case is exactly similar in every material particular with the Yazoo and Mississippi Valley case, just stated; the *termini* of the proposed new line in this case were Meridian and Turpelo.

Harris & Powell, and *Tim E. Cooper,* for appellant in both cases.

We concede, of course, that no corporation, foreign or domestic, can exercise the power of eminent domain unless it is conferred by law, and we further concede that the power may be given to domestic and withheld from foreign corporations. We concede also that one who seeks to exercise that power must put his hand on the statute by which it is conferred; that we shall now attempt to do.

Historically stated, the statutes and decisions relative to the exercise by telephone and telegraph companies of the right of eminent domain are as follows:

By the Code 1871, it was provided that telegraph companies were authorized to construct their lines in this state, and "to set up and erect their posts and fixtures along, and across the turnpikes, railroads and canals, and also through any of the public lands belonging to the state." By an act approved April 5, 1876 (Laws, p. 229), it was provided that "any tele-

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graph company, chartered or incorporated by the laws of this, or any other state, shall, upon making just compensation as herein provided, have the right to construct, maintain and operate telegraph lines through any public lands of this state, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along and upon the right of way and structures of any railroad, and in case of necessity on, under or over any private land in this state." And it was further provided that in case such company should not agree with the owners of the property, it might condemn the same and machinery was provided for the enforcement of this right. By Code 1880 "all companies or associations of persons incorporated or organized for the purpose of constructing telegraph lines in this state were permitted to construct their lines; but the right to exercise the power of eminent domain seems not to have been preserved. Code 1880, § 1065–1070. On March 16, 1886 (Laws, p. 93), the act of 1876 in substance was re-enacted; by its terms it includes not only telegraph but also telephone companies, the words being "any telegraph or telephone company chartered under the laws of this or any other state of the United States." By Constitution 1890, sec. 90, the legislature was prohibited from passing any special law conferring the power of eminent domain, that section declaring that such matter should be provided for only by general laws. In the Code of 1892, the right which by the act of 1886 had been conferred upon telephone and telegraph companies to do business in this state, and to erect their lines upon public property, and to exercise the right of eminent domain was conferred on "companies or associations of persons incorporated, or organized for the purpose of constructing telegraph lines," the words *in this state* which appeared in the Code of 1880 being omitted, and no right of eminent domain or to do business in the state was conferred upon telephone companies. Code 1892, § 854. Section 925 of the Code of 1906 is precisely § 854 of the

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Code of 1892, except that the first clause reads "telegraph or telephone" instead of "telegraph lines," as did the Code of 1892; and § 929 of the Code of 1906 is § 858 of the Code of 1892, except that it also contains a like addition so as to cover telephone lines, and also a further provision in reference to interurban street railways. By Code 1906, § 937, in the chapter on corporations, it is provided that "the provisions of this chapter, when not limited by their terms shall apply to all corporations whatever, when the subject matter is not elsewhere prescribed."

Taking §§ 925, 929 and 937 of Code 1906, as they stand we suppose it will not be denied that it was the legislative purpose clearly expressed to confer the right of eminent domain on some telegraph and telephone companies. We may, we think, assume that much will be conceded. Upon what such companies was it intended to confer the right? From what such companies to withhold it? The appellee contends that the right was given to domestic companies; that it was denied to or withheld from foreign corporations. Looking to the language of sec. 929 it is to be noted.

(1) That nothing whatever is said about *foreign* or *domestic* corporations; and (2) that nothing is said about *any corporations.* The words are *telegraph and telephone companies.* While it is true that a corporation is a company, it is also true that many other associations are companies. "The simple word 'company' will include individuals as well as corporations." *Chicago Dock Co.* v. *Garrity,* 115 Ill., 164. "It may include private partnerships or incorporated bodies of men; hence it may signify a firm, house, partnership or corporation," Cyc. 400; it is used interchangeably with "association." *Lee Mutual Fire Ins. Co.* v. *State,* 60 Miss., 395; the right of eminent domain may be given to corporations, public or private; to individuals, to foreign corporations or to the federal government. Lewis on Em. Dom., sec. 242. It is the purpose for which the right is given,

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and not the person to *whom* it is given that is important, and to which the attention of the legislature is primarily devoted. The end sought to be attained is manifest; it was the establishment of telegraph and telephone lines in order that the public might be served with these facilities which the development of this wonderful age has made necessities rather than luxuries. The appellant is a company engaged in the construction of its telephone lines in this state, which are to be devoted to the service of the public. Unquestionably it is within the letter of the statute, and being within the letter, presumably, it is within its meaning. If it is to be put out of the meaning, it must be by limiting the mean of the words used so as to disclose an implied exception

The above Code sections upon which we rely as conferring the power of eminent domain on the appellant, are parts of chapter 24 of the Code 1906, on "corporations." This chapter deals with three classes of corporations proper; *first,* domestic corporations, organized under its provisions. Sections 897–913–932; *second,* foreign corporations, secs. 914–919, 920–935; *third,* foreign corporations which may elect to come into the state under their original charters, and domesticate here. Sections 915–908; and also, *fourth,* companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines. Sections 925–929; *fifth,* religious societies. Sections 933–934; and *sixth,* ecclesiastical bodies. Sections 934.

The chapter contains one, and only one, grant of eminent domain, that found in sec. 929, and it is conferred upon "telegraph and telephone companies, for the purpose of constructing new lines." This chapter is peculiar in this: that it has a clause for its own interpretation, viz., sec. 937. The grant of the power of eminent domain is to "telegraph and telephone companies." The learned counsel for appellee say that the legislature did not mean *all* telegraph and telephone companies, but meant *some* telegraph and telephone companies.

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Now note the distinction which they draw, and how that distinction must be abandoned, when they come to one of the cognate sections of the chapter, and how it must further be divided and distinguished as applied to *all* the provisions. What the legislature intended, they say, was to confer the right of eminent domain upon domestic as distinguished from foreign corporations. But it is to be remembered that the chapter under review contains provisions, both of which are essential to the construction of telegraph and telephone lines. Section 925 gives the right to telegraph and telephone companies to go along and across public highways, streets, roads, canals and railroads, and through public lands. Under this section and without authority to condemn private property such companies could go on public property and railroads and nowhere else. Section 929 gives the right of eminent domain, but if that stood alone it would, of course, not authorize the occupation of public property, and in the absence of sec. 925 such companies could go on private property and nowhere else. The one power supplements the other; both are essential to the construction of telegraph and telephone lines. There is no reasonable construction by which one of these provisions would be applicable, and the other inapplicable to any telegraph or telephone company. *San Antonia & Arkansas Pass. R. R. Co.* v. *Southwestern Tel. Co.* (Texas), 49, L. R. A., 459.

If secs. 925 and 927 are alike applicable to whatever companies are intended to be dealt with, the contention of the appellees that not *all* but *some* companies only are meant by sec. 929, is met by the express language of sec. 925. It provides that *all* companies or associations of persons incorporated or organized for the purpose of constructing telegraph and telephone lines "shall have the right therein designated."

As a matter of precaution the legislature after enacting the foregoing section then took up the precise subject now under investigation and declared in sec. 937 that "the provisions of

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this chapter, when not limited by their terms, shall apply to all corporations whatever, where the subject matter is not elsewhere prescribed." The subject now under investigation is dealt with in the chapter. That is not denied. It is not elsewhere prescribed. That is not asserted. The argument is that there is an implied exclusion of foreign corporations from the benefits of the statute, although its terms are broad enough to comprise them, and although the interpreting section distinctly declares that they apply to *all corporations* whatever.

Under such statutes the right is conferred upon foreign as well as domestic corporations. 15 Cyc., 574; *N. Y. R. R. Co.* v. *Welsh,* 143 N. Y., 411, 42 Am. St. Rep., 734. In 1899 the Postal Telegraph Cable Company, *a foreign corporation* proceeding under the provisions of the Code of 1892, similar, as stated, to the foregoing sections of the Code of 1906, filed its petition to condemn a way along the roadway of the Mobile & Ohio Railroad Company, and its right was maintained. *Mobile, etc., R. R. Co.* v. *Postal Tel. Co.,* 76 Miss., 731, s.c., 26 South., 370.

In June, 1906, the case of *Alabama & Vicksburg Railroad Company* v. *Cumberland Telephone & Telegraph Company et al.,* 88 Miss., 438, 41 South. Rep., 258, was decided by this court. The Cumberland Telephone Company and a domestic telegraph company, styled the Mississippi Telegraph Company, filed condemnation proceedings against the railroad company to condemn for their lines along the roadway of the company; this proceeding was under the Code of 1892; it was held by this court that a telephone company did not have under the Code of 1892 a right of condemnation, but it was also held that the Mississippi Telegraph Company did have the right of condemnation along the roadway of the railroad. If the right of eminent domain was not given to telegraph companies by the Code of 1892, to condemn for its lines along the right of way of a railroad company, the right was conferred by §§ 925, 929 and 937 of the Code of 1906.

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Why the right of eminent domain given by the act of 1886 to telephone companies as well as telegraph companies was dropped from the Code of 1892, it is impossible to conjecture, but it is restored by the Code of 1906.

While statutes granting the right of eminent domain are to be strictly construed, they, like all other statutes, are to be so accepted as to carry out the legislative purpose. Statutes conferring the right of eminent domain do not *create* a right, and confer a remedy; for the right of eminent domain is a common law right. *Avery* v. *Groton,* 6 Conn., 304; *Tidewater Canal Co.* v. *Archer,* 9 Gill & J., 479.

There is no conceivable reason why a distinction should be drawn as between resident and nonresident corporations engaged in this service; it is to be borne in mind that as a matter of fact this state does not discriminate in any respect against foreign corporations except those engaged in the operation of railroads. They are all permitted to come into the state on a perfect equality with domestic corporations; they may bring their own charters here and domesticate by recording them, or they may do business as foreign corporations by merely filing their charters. Of course, any corporate power derived from their charters, the exercise of which is contrary to the policy of the state, would be forbidden here, but aside from that necessary and proper limitation, foreign corporations may operate here as they may in the states of their domicile, and the implied prohibition against the exercise of powers contrary to public policy is not discriminatory as between foreign and domestic corporations, for the domestic corporation cannot take such power by its act of incorporation.

The use of the railroad company's right of way for telegraph or telephone purposes is not a material interference with the use for railroad purposes. Lewis on Em. Dom., 269; Mills on Em. Dom., sec. 45. The subject is thoroughly examined, and fully decided in the following cases: *St. Louis*

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Brief for appellee.

R. R. Co. v. *Postal Telegraph Co.*, 173 Ill., 508; *Mobile & Ohio R. R. Co.* v. *Postal Telegraph Co.*, 120 Ala., 21; *Railroad Company* v. *Tel. Co.*, 53 Ala., 211.

The objection is made by counsel for appellee that the appellant has lines along the route sought to be acquired, and that the condemnation is not for the purpose of constructing new lines. The affidavits introduced on the hearing of the motion to dissolve refer to this contention. There is no line either from Meridian to Tupelo or from Jackson to Natchez; there are means of communication through other lines having distinct and separate exchanges, but these means are inefficient, and their use results in great delay and inconvenience, not only to the appellant, but to the public. Some of these lines belong to other companies with which the appellant has connection, and others, it seems, are lines running out from its exchanges and owned by individuals whose private purposes they serve. In the case of *Mobile, etc., R. R. Co.* v. *Postal Telegraph Co.*, 76 Miss., 731, s.c., 26 South., 370, the same objection was made by the bill to which a demurrer was interposed, and which was sustained by the lower court, and affirmed by this. In that case a part of the line along the railroad had already been secured, but the purpose of the telegraph company was to extend a line through Mississippi from the Alabama and Tennessee line. We submit it is clearly shown that the lines intended to be constructed are new lines within the meaning of the statute.

Mayes & Longstreet, and *C. N. Burch,* for appellee, Yazoo & Mississippi Valley Railroad Company, and *J. M. Boone,* and *Bozeman & Fewell,* for appellee, Mobile & Ohio Railroad Company.

The questions to be considered in these cases are three; and stated in the order of their importance they are as follows:

1. Under the laws of this state, is any foreign telephone

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company authorized to exercise, in this state, the power of eminent domain?

2. If so authorized, then is any such telephone company authorized, even on making compensation, to exercise such power in order to establish its line upon and along the rights of way of railroad companies?

3. Even if so authorized, is any telephone company authorized to exercise such power, not for the purpose of establishing a *new* line, but for the purpose only of *relocating* more conveniently to it, a line already established and in operation when the Code of 1906 became operative?

Each of the foregoing questions, we contend, must be answered in the negative; and so answered, any one of them disposes of this case.

It is settled law that the power to take land for public use, by virtue of the right of eminent domain, is distinctly a governmental power, and cannot be exercised by a corporation except by virtue of a grant of authority by the sovereign in whose jurisdiction the land lies. *Re Townsend,* 39 N. Y., 171; *Holbert* v. *Railroad Co.,* 45 Iowa, 23; *Baltimore Co.* v. *Pittsburg Co.,* 17 W. Va., 814, 864; *Glover* v. *Boston,* 14 Grey, 282; *Re South Beach Railroad,* 119 N. Y., 141; *Howe* v. *Williams,* 13 R. I., 488; *Phillips* v. *Railroad,* 78 Pa., 177; *Lynch* v. *Commissioners,* L. R., 32 Ch. D., 72.

Counsel for appellant rely upon Code 1906, §§ 925, 929 and 937 to uphold their contentions in this case. But any adequate consideration of the questions in issue must turn at last on, not these sections only, but also on secs. 1854 and 1876 in the chapter on eminent domain.

The Mississippi cases relied on by counsel for the appellant are wholly foreign to this discussion. *Mobile, etc., R. R. Co.,* v. *Postal Tel. Co.,* 76 Miss., 731, s.c., 26 South., 370, was based on the act of 1897, p. 13, which expressly conferred the power on "telegraph companies, chartered under the laws of this or any other state of the United States." This statute was

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not brought forward into the Code of 1906, and consequently is now superseded. In *Alabama, etc., Railroad Co.* v. *Cumberland, etc., Co.,* 88 Miss., 438, 41 South., p. 258, the Mississippi Telegraph Company was adjudged to have the power to condemn, under the statutes then existing, for the express reason that it was a Mississippi corporation; and the Cumberland Company was adjudged not to have the power because no law or constitutional provision conferred it. The case is really a direct authority for our proposition, announced above.

Counsel for appellant rely upon the comprehensiveness of the terms employed, Code 1906, §§ 925 and 929: *"All* companies or associations of persons organized for the purpose of constructing telegraph or telephone lines," and "telegraph and telephone companies," say the two statutes; and counsel note those broad terms, and turn for further argument to Code 1906, § 937, which provides that "the provisions of this chapter shall apply to all corporations whatever, where the subject matter is not elsewhere prescribed." And opposing counsel conclude that this is clear indication that foreign corporations are included within all of the provisions of the chapter on corporations, including the right to condemn. We deny the conclusion. The Ohio statute, for instance, provided that "a magnetic telegraph company heretofore or hereafter created may construct telegraph lines, etc." It was *held* that these terms did not include a New York corporation. *Postal Company* v. *Cleveland, etc., Railroad,* 94 Fed., 234.

That the generality of the terms of these statutes does not show an intention of the legislature to include foreign corporations, is demonstrated by the history of their enactment.

By chapter 38 of the Laws of 1886, p. 93, it was expressly provided, in order to encourage and facilitate the construction of telegraph, telephone and other like lines, that, "Any telegraph or telephone company, *chartered or incorporated by the laws of this or any other state of the United States,"* might,

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in brief, condemn ways along highways, roads, private lands etc.

This statute was obviously procured in order to meet the want of power felt by such companies to exist under § 1065 of the Code of 1880. It contained the two principal features of a concession to foreign corporations, and of a concession to telephone companies, of the right of eminent domain. But that act was not brought forward into the Code of 1892. That code *repealed* it; *Alabama, etc., R. R. Co.* v. *Cumberland, etc., Co.*, 88 Miss., 438, 41 South. Rep., 258. The Code of 1892 re-enacted § 1065 of the Code of 1880, and also contained a new section, sec. 858, which conceded the right of eminent domain to telegraph lines only, and to them only for new lines; and the provision about foreign companies was *studiously omitted.* Then the telegraph companies tried the matter over again, and obtained the enactment of the statute of 1897, p. 13, in which, under the guise of providing a more convenient *remedy,* the very substantial right was won back of condemning railroad rights-of-way by "telegraph companies chartered under the laws of this or any other state of the United States," etc.

Now, let this court observe the formative processes of our present code sections. First, examine the Dummy Code, submitted by the Code Commissioners to the legislature of 1906.

Section 854 proposed in the Dummy Code was § 854 of the Code of 1892, literally. Also, sec. 858 proposed by the Dummy Code was § 858 of the Code of 1892, with an addition in respect to interurban street railways. Section 1700a, proposed by the Dummy Code, was the act of 1897, literally.

What did the legislature do with those recommendations? that is, what did they do with the then existing statutes? for those recommendations were simply the statutes then existing.

First, in the *House.*—Sections 854 and 858 above were amended by inserting the words "or telephone" (House journal,

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p. 774); and this amendment was finally adopted without any trouble.

Second, in the *Senate*.—The Senate committee recommended that sec. 1700a be amended by inserting the words "or telephone" in proper places; and also by *striking out* the words "or any other states of the United States," and by inserting in lieu thereof the word "state."—This recommendation was adopted. Therefore immediately a substitute was offered for the section recommended by the committee, amended and adopted; and this substitute was adopted, and it is the present sec. 1878 (Senate journal, pp. 443, 444).

Thus, not only does the *form* of the section as it now stands in the Code show the alteration of the act of 1897 by the omission of that feature thereof which authorized foreign telegraph companies to condemn; but also the Dummy Code, and the journals of the two houses affirmatively and clearly show that this very matter was directly and carefully considered and acted on by both houses. The change in the statute was not the result of accident or oversight, but was deliberately done.

Again: it is to be noted that in 1886 and in 1897, these foreign companies had twice procured acts authorizing them to condemn property in this state; and in both of the codes immediately following, that right was taken away.

Indeed it would be a singular thing if, in *this* state, the right to expropriate property should be conferred on foreign corporations in a manner so obscure and incidental as is claimed here. The right of eminent domain is one of the most extraordinary and jealously guarded privileges of sovereignty, the nonabridgment of it is even secured by constitutional provision; and it is not lightly to be considered as delegated to any set of individuals, and still less to a foreign artificial entity whose domicile is outside the state, and whose internal workings are beyond the state's investigation or control.

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Brief for appellee.

Section 929 is the only section in the Code chapter which declares that telegraph and telephone companies (of any sort) may exercise the power of eminent domain; and the declaration is that they may exercise that power *as provided in the chapter on that subject.*" Here is the matter "prescribed elsewhere." And this striking restriction of the extent and conditions of such exercise to the provisions of the chapter on eminent domain, is carefully repeated, in the same section, in the sentence (a new one) about street railways. Herein is a manifest and indisputable reference to § 1876 of the Code, which is the section in the chapter on eminent domain containing the regulation of condemnations by telephone companies, telegraph companies and street railway companies, of railroad ways—a clear supplement to sec. 929—and sec. 1876 not only does not declare that condemnations may be made by foreign companies; but even, by its very terms restricts the power to companies "chartered under the laws of this state"; and from the original draft of it the legislature, as we have already shown, struck out the words letting in foreign corporations, and thereby to that extent repealed the existing act of 1897.

No telephone company, foreign or domestic, can, in this state, condemn a right of way along the right of way of a railroad.

We do not claim that such power cannot be conferred by the legislature: but do claim that it has never been conferred.

It is a well established rule that property already devoted to public use is so far favored by the state that it cannot be taken in furtherance of a new use, unless the legislature plainly intends it to be; *Penn. Railroad Appeal,* 93 Pa., 150; *Springfield* v. *Railroad,* 4 Cush., 63; *Railroad Co.* v. *Railroad Co.,* 124 Mass., 368; *Boston, etc., Railroad,* 53 N. Y., 574; *New York Central Railroad,* 77 N. Y., 248; *People* v. *Thompsom,* 98 N. Y., 6; *Wheeling Bridge* v. *Bridge,* 34 W. Va., 155; *Railroad Co.* v. *Faribault,* 23 Minn., 167; *Atlanta*

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Brief for appellee.

v. *Railroad Co.*, 53 Ga., 120; *Railroad Co.* v. *Belle Centre*, 48 Ohio, 273.

The erection of a telephone line along the right-of-way of a railroad, is the imposition of a new use, and is a partial taking of the railroad's property. *Telegraph Co.* v. *Railroad Co.*, 6 Biss., 158; *Stowers* v. *Telegraph Co.*, 68 Miss., 558, s.c., 9 South, 356.

Section 925, and its following and supplementary sec. 926, do not even purport to confer the power of eminent domain on *any* company, foreign or domestic. Their manifest intention and effect are to authorize telegraph and telephone companies, so far as the right of *public property* is concerned, or the *public interest* is concerned, to construct and operate their lines upon and over those places which either belong to the public or else are charged with a *public use.*

No telephone or telegraph company, foreign or domestic, is authorized to employ the power of eminent domain merely in order to relocate an established line.

Section 929 of the Code is appellant's charter—such as it is. The restriction by it is express. The companies are authorized to exercise the power, not only under the restrictions of the chapter on eminent domain, but even then only "for the purpose of constructing *new lines.*" This limitation cannot be ignored.

What is a "new line?" We maintain that a new line is not constructed when the company merely desires to relocate its poles and wires to subserve its own convenience and economies, even though moving them over comparatively wide spaces, if the lines as relocated and reconstructed serve substantially the same groups of patrons. It is a question of an employment of the state's prerogative. Neither the state in its governmental capacity, nor the public of more restricted areas of the state, has any concern whatever in the conveniences and economies of the company. If the people have service established and in use, that is all they are concerned about;

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and there is no *reason* for the state's prerogative to be employed for the company's exclusive profit. *Lusby* v. *Railroad Co.*, 73 Miss., 360, 19 South., 239.

Argued orally by *J. B. Harris,* and *Tim E. Cooper,* for appellant.

Edward Mayes, and *A. S. Bozeman,* for the respective appellees.

MAYES, J., delivered the opinion of the court.

The main question to be considered in this case is whether or not a foreign telephone company has the power, under the laws of this state, to exercise the right of eminent domain. That the power to exercise this right and take land for public use by virtue of eminent domain proceedings can only be exercised by virtue of the authority of the state in whose jurisdiction the land lies is, we think, incontrovertible law. It is conceded in this case that the Cumberland Telephone & Telegraph Company is a nonresident, and not chartered under any law of the state of Mississippi. In the chapter on corporations (§ 925) of the Code of 1906 it is provided that "all companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines shall be authorized to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, or waters, and along and across all turnpikes, railroads, and canals, and also through any of the public lands; but the same shall be so constructed and placed as not to be dangerous to persons or property, nor interfere with the common use of such roads, streets, or waters; or with the convenience of any landowner more than may be unavoidable; and in case it shall be necessary to cross any highway, the same shall be so constructed as to cross such highway at right angles." By the above section, which is found in the

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chapter on corporations only, it will be seen that express authority is given to all companies or associations of persons, incorporated or organized for the purpose of constructing telegraph or telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across all turnpikes, railroads, etc. On the reading of this section—that is to say, § 925 of the Code of 1906—there can be no doubt that the legislature intended to give the authority to all companies alike, whether foreign or domestic, to construct their lines along and across turnpikes, railroads, etc. It is true that in this section no power of eminent domain is conferred, and, if this section stood alone, no telephone company could avail itself of the authority granted, except by contract with the authority in control of the highways, streets, or waters, or with the owners of the turnpikes, railroads, etc. But under sec. 929, in the same chapter, telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. Taking, then, these two sections together, we find that by sec. 925 all companies or associations, incorporated or organized for the purpose of constructing telegraph or telephone lines, are given the authority to construct their lines along and across the property named in sec. 925; and by sec. 929 telegraph and telephone companies—that is to say, all telegraph and telephone companies—are empowered to exercise the right of eminent domain for the purpose of constructing new lines. In the whole chapter on corporations the grant of eminent domain powers is found in but one section, and this is in sec. 929, above referred to, and is conferred upon telegraph and telephone companies, whether foreign or domestic, and for the purpose of constructing new lines; and the only other corporation which is given this power in the chapter on corporations is the interurban street railway, and, as with telephone companies, it is given only for the purpose of constructing new lines.

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Opinion of the court.

If the sections of the statute quoted above stood alone, there would be no difficulty about this case. If the two sections quoted were the only places wherein this subject was dealt with in the Code, it would be too plain for argument that the statute not only gives authority to the telephone company to run its line along the right of way of the railroad, but has given it an enforceable authority, in that it has empowered it, in furtherance of the erection of its line along the right of way of railroads, to condemn the property for the purpose of erecting thereon its telephone line. The confusion grows out of the fact that in another section of the Code the law undertakes to deal again with this same subject. In the chapter on eminent domain (sec. 1876) it is provided that "telephone, telegraph or street railway companies, chartered under the laws of this state, may acquire a right of way across railroads by condemnation by proceeding in accordance with the provisions in this chapter." Now, note the distinction between sec. 925 and sec. 929, found in the chapter on corporations, and sec. 1876, found in the chapter on eminent domain. In the first place it will be noted that sec. 925 authorizes all companies or associations of persons, incorporated or organized for the purpose of constructing telegraph or telephone lines, to construct the same, etc. In this section there is no restriction upon the right of any telegraph or telephone company to exercise this authority, whether it be chartered according to the laws of this state or not; but the authority is given generally to all companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines. In sec. 929 power to exercise the right of eminent domain is given, indiscriminately and without restriction, to "telegraph and telephone companies." In these two sections nothing is said as to the place where these telegraph and telephone companies are to be chartered. In other words, the general authority is given to any and all telephone companies to construct their lines along railroads,

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etc., and the general power is given to all telephone companies, when constructing a new line, to exercise the right of eminent domain, irrespective of where they may reside or where they may have procured their charter. Another thing is to be noted in reference to sec. 929, and that is that the authority is not only given to all companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines to construct same, but the statute expressly says that they may set up and erect their posts and fixtures along and across any of the public highways, railroads, etc. Now by this section authority is expressly given both to run the line along the railroad, and also across the railroad, if necessary. By sec. 1876 the only power given a telephone company to acquire a right of way by condemnation proceedings is, first, that they may only acquire a right of way across a railroad; and, secondly, under this section, the only telephone company which may do this is a telephone company chartered under the laws of this state. The object of the condemnation proceedings in the case before the court is to condemn a right of way along the railroad, as authorized by sec. 925, and not across.

It is argued by counsel for the respective appellees that under sec. 929, giving to telephone companies the right to exercise the power of eminent domain, it is provided that the right must be exercised as is provided in the chapter on that subject. Turning to the chapter on eminent domain, the only power to exercise the right is given to telephone companies chartered under the laws of this state. From this counsel argue that it necessarily follows that no telephone company, other than a telephone company chartered under the laws of this state, has the power, in any event, to exercise the right of eminent domain, and that even a domestic company can condemn a right of way across a railroad, and not along its right of way. We cannot adopt this construction of the statute. If all the authority which any telephone company has to exercise the right

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of eminent domain is to be found in sec. 1876, and secs. 925 and 929 are to be disregarded, the telephone business in this state would have to be abandoned. We cannot give the law such an interpretation, for to do so would be to involve the legislature in what might properly be called "legislative nonsense." Let us see what would follow. In the first place, no company could exercise the right of eminent domain, except a company chartered under the laws of this state. In the next place, they could not condemn property anywhere, except a right of way across the railroad. They would have to establish their office on one side of a railroad right of way, and could only run their lines across this right of way to an office on the other side. They could not leave when they got across, because they have no other power by sec. 1876 except to condemn the right of way across the railroad; nor could they bring their lines to the right of way along the streets or highways, for they have no power under this section except to establish a line across the railroad. In other words, the authority granted by sec. 925 to construct their lines, and set up posts along and across the public highways, streets, or waters, turnpikes, canals, and through any of the public lands, and the power to exercise the right of eminent domain given them by virtue of sec. 929, all fade out and become a mere nothing before sec. 1876, if it is to be said that this section gives the only powers which telephone companies have under the laws of this state is to acquire rights of way. When § 929 of the Code says that telegraph and telephone companies, for the purpose of constructing new lines, may exercise the right of eminent domain as provided in the chapter on that subject, it merely means they must exercise the right according to the procedure outlined in chapter 43 on the subject of eminent domain as being the procedure by which all corporations having the power of eminent domain must proceed when undertaking to condemn property, and does not refer to sec. 1876, the only place in the chapter where telephone companies

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are mentioned, as being the measure of power which telephone companies have in this state to exercise the right. Even telephone companies chartered under the laws of this state, as provided in sec. 1876, when they undertake to assert the right that is given them to acquire a right of way across railroads by condemnation, must proceed in accordance with the provisions "in this chapter"; that is to say, in the chapter on eminent domain, for no other way is pointed out by sec. 1876. When they undertake to enforce the right given by sec. 1876, they must do exactly what is required of telephone companies by sec. 929 when they undertake to enforce by eminent domain proceedings the authority conferred upon them by sec. 925 of the Code; that is to say, they must proceed "as is provided in the chapter on that subject"—that is, chapter 43, on the subject of eminent domain.

We are now dealing with the right that a foreign telephone corporation has to erect its along the railroad right of way and the power it has to condemn for this purpose. We are not dealing with any of the rights which are given to telephone companies chartered under the laws of this state according to sec. 1876. The right there given, the only right given, is the right to acquire a right of way across railroads. We will deal with the power that a foreign telephone corporation has to condemn a right of way across railroads when that question is presented to us. We say nothing as to the effect which sec. 1876 has upon sec. 925 and sec. 929, further than we have expressly stated in this opinion.

Counsel for appellee next insist that, even if it be true that the power of eminent domain is granted to the telephone company, still it is expressly limited to the construction of new lines and cannot be exercised when it is the purpose of the telephone company to merely relocate its poles and wires to subserves its own convenience and economies, even though moving them over comparatively wide spaces, if the line as relocated and reconstructed serves substantially the same

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group of patrons. We are not disposed to give so narrow a construction to the statute. To do so would be subversive of the public policy of the statute and the evident intention of the legislature. It is our view that a "new line" is constructed, within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying land not theretofore occupied by it. The facts in this case show that the telephone company is not now operating, and does not own, a direct line from Jackson to Natchez, or over the route proposed to be acquired by this proceeding. The only means of communication between Jackson and Natchez is by the circuitous route from Jackson to Vicksburg, and from Vicksburg to Fayette, and from Fayette to Natchez. It is proposed to construct a direct line from Jackson to Natchez along the right of way of the Yazoo & Mississippi Valley Railroad Company running from Jackson to Natchez, and clearly it cannot be argued that this is not the construction of a new line within the meaning of this statute. A like state of facts, the construction of a distinct line from Meridian to Tupelo, is presented in the Mobile & Ohio case.

The question of equity jurisdiction is settled in the case of *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown R. R. Co.*, 89 Miss., 84, s.c., 43 South., 292.

The motion to dissolve the injunction is sustained in each case, and the case is reversed and remanded.

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Statement of the case.

BANK OF LOUDON v. JOHN H. ARMOR.

[44 South., 66.]

BUILDING AND LOAN ASSOCIATIONS. *Loans. Accountings. Stock dues. Usury.*

A true building and loan association, issuing stock to its members, and exacting stock dues in good faith and not as a cloak for usury, is not to be charged with payments made on such dues in an accounting with a borrowing member, where the inquiry is whether the loan to him was usurious.

FROM the chancery court of Union county.

HON. JOHN Q. ROBINS, Chancellor.

Armor, appellee, was complainant in the court below; the Bank of Loudon (Tennessee), appellant, was defendant there. From a decree favorable to complainant defendant appealed to the supreme court.

Armor, complainant and appellee, was a subscriber for the stock in a building and loan association known as the Atlas Savings & Loan Association, of Chattanooga, Tennessee, and he also borrowed money from the association, securing the loan by a trust deed on his homestead, and thereafter made divers payments on stock dues, etc., to the association.

The association went into liquidation and its affairs were placed in the hands of a trustee; the trustee called on Armor for a settlement or adjustment and Armor gave him four notes for the sum agreed to be due and secured these notes by a deed of trust on some lands in Mississippi. These notes were transferred and assigned by the payee in them to the Bank of Loudon, appellant, and two of them were paid to the bank by Armor, appellee.

Thereafter this suit was begun by appellee, praying that the original contract between himself and the building and loan association should be adjudged to have been usurious,

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Brief for appellant.

the notes held by the bank to have been paid and to be void, and the trust deed given to secure them, canceled as a cloud upon the title to the land.

The case was once before in the supreme court and is reported, *Armor* v. *Bank of Loudon,* 86 Miss., 658, s.c., 39 South., 17, where a full statement of the facts is given.

Stephens & Stephens, for appellant.

This case has been before this court on a former appeal; see 86 Miss., 658. After the case was reversed, leave was granted to amend the answer. This amendment presents an entirely different case to the one formerly passed on by this court.

The attorney who drew the original answer was not fully conversant with the facts; and in the answer certain admissions were made which, as is fully shown by the records, were not in accord with the true history of the case.

For instance, it was admitted in the original answer that the subscription for stock and the application for the loan were made at one and the same time. This is shown to be untrue. The amendment corrects this error.

Again, it was stated in the original answer that the four notes were taken payable to Lowrey to avoid a protracted liquidation. This was an error, as is fully shown by the deed in trust.

These two admissions very largely influenced this court in the rendition of its opinion on the first appeal.

The whole question of usury in this case hinges on the application of the payment of dues on the shares of stock. Each subscriber to stock in Class "C" was required to pay, as dues on the same, sixty cents per share. This is true whether the stockholder borrowed from the association or not. Armor paid $3 per month as dues on his stock.

The members of the association are divided into two classes: Borrowers and non-borrowers. It is immaterial whether a

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stockholder remains an investor or becomes a borrower. He must pay dues, and the same amount of dues, in either capacity.

"The obligation to pay dues is contemporaneous with the membership in the society, arises from the inherent nature of the contract of membership, and ends only when the membership ceases to exist. The fact that a member has become a borrower in nowise affects his liability to pay dues." 2 Am. & Eng. Ency. L. (1st ed.), 618.

That the relation existing between the stockholder and the association, so far as membership and the obligation to pay dues are concerned, is unchanged by the stockholder becoming a borrower, we think is well settled.

We cite in support of this contention *McPhilamy* v. *Association,* 81 Miss., 61, s.c., 32 South., 1001; Endlich on Building Associations, sec. 477; *Young* v. *Association,* 47 W. Va., 514; 5 Am. & Eng. Decisions in Equity, 238.

These authorities recognize the "dual capacity" of the borrowing stockholder; that he still retains his membership in the association; and that he is still required to pay stock dues.

That stock dues are not to be credited on the debt, and that the payment of stock dues do not reduce the debt, but that the debt remains the same throughout the entire period through which it runs, we cite the following authorities: *Sullivan* v. *Stucky,* 86 Fed., 491; *El Paso Building Ass'n* v. *Lane,* 81 Tex., 6; *North American B. & L. Ass'n.* v. *Sutton,* 35 Pa., 93; *Towle* v. *American Ass'n,* 61 Fed., 446; *Leahy* v. *National Ass'n,* 76 N. W., 625; Endlich's Building Ass'ns, 2d ed., sec. 477; *State* v. *Hornbecker,* 42 N. J. L., 635; *International Ass'n* v. *Abbott,* 85 Tex., 220; 2 Am. & Eng. Ency. L. (1st ed.), 628.

As the borrowing member has no right to have dues applied as payments on his loan, it follows that he can not have them applied as interest payments, "because such payments are not made for the use of the money, but to acquire an interest in the

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nature of a partnership interest in the property of the association."

"Stock dues cannot be considered in determining whether interest paid is usurious, where it is not intended to apply them to the loan until maturity." Current Law, vol. 1, p. 393.

"In determining the question of usury, stock payments are to be disregarded." 4 Am. & Eng. Ency. (2d ed.), 1071.

"Nor can it be claimed that an unvarying amount of interest for the period of time the loan is to continue is usurious, on the ground that the payments on the stock are constantly reducing the amount the borrower will ultimately have to pay; for a payment of dues has nothing to do with the payment of interest." Thornton on Building Associations, 267.

"But upon such payment of monthly dues the mortgagor can claim no interest, nor require any application of them to be made as payments at the time when received. They are not payments originally required or stipulated to be made as payments toward any loan. They are paid as the capital stock of the company, and paid alike by those who do and those who do not take loans. Those who take loans may apply them, on the final adjustment of the loans, to the discharge of the loan; but they are to be applied in a gross sum and without any interest thereon." *Barker* v. *Bigelow,* 15 Gray., 130.

The only cases, so far as we can find, that hold either that monthly dues should be credited as payments on the loan as of the date of their payment, or that dues should be counted as payment of interest on the loan, are of two classes:—

First. Those that proceed upon the theory that the assessment of stock as collateral security for the loan puts an end, at once, to the relationship of member in the association; and that the borrowing member and the association, thenceforth, occupy towards each other simply the relation of debtor and creditor; and,

Second. In those cases where the contract, from its very

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inception, was usurious; or more than the legal rate of interest was stipulated for in the contract.

The weight of authority is very much against the first class, that is, the weight of authority holds that the fact that stockholder borrows from the association does not change his relation as such stockholder.

The second class of cases does not affect us, because the rate of interest charged Armor including premium was less than ten per cent.

Our case is very different from *Sokoloski's case,* 77 Miss., 155, s.c., 26 South., 361; *Tony's case,* 78 Miss., 916, s.c., 29 South., 825; *Shannon's case,* 78 Miss., 955, s.c., 30 South., 51; *Pinkston's case,* 79 Miss, 468, s.c., 30 South., 692, and others decided by our supreme court; because, in those cases, more than ten per cent interest was stipulated for and charged, when the amount charged as premium is included, as is proper.

Armor had no right to expect that on this settlement he would be credited on his loan with anything more than the value of his stock. This was all he was entitled to.

C. Lee Crum, for appellee.

Every point now being urged in this case, which is an appeal from the decree of the lower court rendered in accordance with the principles announced in this case in the former opinion of this court was argued on a former trial of this case here, orally and by brief, by both parties *in extenso.* At the new hearing of this case upon the application of the defendant below, now the appellant, the court below permitted amendments to be made denying that the application for membership in the association, depositing of collateral, the payment of dues, premiums and interest, the loan and borrowing of money from the Atlas Savings & Loan Association and the giving of the deed of trust, were all one scheme and arrangement to secure the loan; and also denying that the contract with Lowery was a merger of original indebtedness to the Atlas Savings

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& Loan Association. The only additional testimony taken that is before the court now that was not before the court on the former appeal is the testimony of Lowery, but his testimony does not touch the question of usury and shows conclusively that Armor did not actually borrow money from him to pay this building and loan contract.

The testimony of Armor which was before the court on first appeal and is now a part of the record, shows clearly that the subscription for the stock, the contemporaneous application for the loan, the execution of the contract and deed of trust, and the depositing of certificates of stock as collateral, were all parts of the same scheme to negotiate and secure the loan and there is no testimony denying it.

In the argument of counsel for appellant the facts in the case at bar are entirely ignored in so far as the question of usury is involved. Counsel in his brief says: "The relation existing between the stockholder and the association, so far as the membership and the obligation to pay dues are concerned, by the stockholder becoming a borrower, is unchanged, we think well settled." This is the premise from which he argued. There are a great many cases reported in the books, a large number of which have been cited by counsel for appellant, holding that in those cases the borrowing member continues to be a member, and his stock dues should go to mature his stock, but the facts in those cases are not the same as in the case at bar, because in this case for all intent and purposes Armor, who borrowed this money, lost all control of his stock and ceased to be a member of the association.

Counsel cites *McPhilamy's case,* 81 Miss., 61, s.c., 32 South., 1001, as an authority for using the stock dues to mature the stock and not allow them to be applied as credits as of the dates of their payment, but there is a wide difference between the facts in *McPhilamy's case* and the facts in the case at bar. In that case the association was insolvent; in this case the *Atlas Savings & Loan Association* was solvent and went into voluntary liqui-

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dation. In *McPhilamy's case* the court held that under the contract McPhilamy remained a member, in fact, of the association, but in the case at bar, Armor is not, in fact, after borrowing this money and depositing his shares of stock as collateral, a *bona fide* member of the Atlas. The court, in *McPhilamy's case,* quotes approvingly from 7 Thompson on Corporations, sec. 8796, the following language: "Since the cessation of the business of the association puts an end to the contract between it and its borrowing members and makes their loans due and payable at once, it converts the relation between them into that of a mere debtor and creditor and consequently should entitle the borrower to have the dues credited on the loan, if no equity supervenes. Accordingly this rule is generally acknowledged to prevail in cases of voluntary dissolution or cessation of business.

Argued orally by *R. V. Fletcher,* for appellant.

MAYES, J., delivered the opinion of the court.

This case is on appeal for the second time. Unless the stock dues are to be credited as payments on the indebtedness, the record shows that this contract is not usurious. In the former case the court held that the stock dues were to be credited, and that therefore the contract was usurious. On an analysis of the opinion of the court in that case the court did not hold, and did not intend to hold, that stock dues, as a general proposition, were to be credited on the indebtedness of a borrower, where the borrower sustained the dual relation to the building and loan association of stockholder and borrower. To have so held would have been to overrule the *McPhilamy case,* 81 Miss., 61, 32 South., 1001, decided long prior to the case of *Armour* v. *Bank of London,* 86 Miss., 658, 39 South., 17. The court merely held, in the opinion in the case of *Armor* v. *Bank of Loudon,* 86 Miss., 658, 39 South., 17, that upon the pleadings as framed in this particular case the stock dues should be

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Opinion of the court.

credited as payments upon the principal debt. The opinion of the court is made to hinge upon this, quoting from the opinion of the court as follows: "It is averred in the bill that the subscription for stock, the contemporaneous application for the loan, the execution of the contract and deed of trust, and the depositing of certificates of stock as collateral, were all parts of the same scheme to negotiate and secure the loan. This averment is not denied, and must therefore be treated as confessed. Section 4, art. 9, by-laws of the Atlas Savings & Loan Association, with reference to which the loan was made and the securities taken, provided that: 'Every member who procures a loan shall secure the payment by an acceptable deed of trust, mortgage, or deed on real estate, the conservative value of which must be at least twice the amount wanted, and this deed of trust, mortgage, or deed shall remain in force till the monthly dues, applied to the general fund, dividends, and reserve apportioned, make up the sum of one hundred dollars on each share drawn. The deed of trust, mortgage, or deed shall then be canceled, and such member shall cease, with regard to his incumbered shares, to be a member.' The confessed averments of the bill, taken in consideration with the section from the by-laws above quoted, make it clear that in the instant case the taking of stock was merely a condition to the getting of the loan, that appellant was in reality never to acquire any stock, but that the payment in full for the stock was *ipso facto* to pay the loan and cancel the stock. This is nothing but a scheme to evade the law against usury, and we are therefore constrained to differ with the opinion of the learned chancellor that the contract was not usurious."

This case comes back to us in quite a different aspect. The basis upon which the former opinion was grounded was that the bill averred that the subscription for stock, the contemporaneous application for loan, the execution of the contract and deed of trust, and the depositing of certificates of stock as collateral, were all parts of the same scheme to negotiate and

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secure the loan. This averment was not denied, and, this being the case, the court held that the whole transaction was but one thing, and constituted a scheme to avoid the law against usury, and therefore that the interest, the premium, and the stock dues, all being paid upon one contract according to the pleadings, made the contract usurious, and therefore both the premium, interest, and stock payments should be credited upon the principal debt, and when this was done the contract was shown to be usurious. In this case the averments of the bill are now expressly denied, and by the terms of the contract the amounts paid as premium and interest are less than ten per cent unless the stock dues are to be credited, and the contract is therefore not usurious. We think, as the record now comes to us, with these averments denied, that the borrower sustained both the relation of the stockholder and borrower to this association, and that his stock dues should be credited as payments upon the principal. Under sec. 4 of art. 9 of the by-laws above quoted it is shown that while he puts up his stock as collateral security, yet he is to participate in the general funds, dividends and reserve. In other words, he is to participate in whatever advantage accrues to any other stockholder by virtue of being such up to the time the value of his stock equals the amount of his debt. In the case of *Sokoloski* v. *Building & Loan Association* (Miss.), 43 South., 674, the court has reannounced the doctrine laid down in the *McPhilamy case,* and nothing that is said in the opinion in the case of *Armor* v. *Bank of London.* 86 Miss., 658, 39 South., 17, in any way conflicts with the decisions in the two cases above referred to. The whole predicate of the case of *Armor* v. *Bank of Loudon, supra,* is upon the fact that under the pleadings there was in reality no genuine building and loan contract, but a mere subterfuge, and, that being the case, all the money paid should be credited to the debt of the borrower.

Reversed and remanded.

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Statement of the case.

TYRE S. OLIVER v. HIRAM C. BAIRD ET AL.

[44 South., 35.]

JUDGMENTS. *Default. Injunction. Case.*

An equity suit to enjoin a judgment, rendered by default against complainant as a nonresident defendant in an attachment at law, is maintainable where (*a*) defendant was without notice of the suit until after the judgment became final, (*b*) his post-office address was well known to the plaintiff in attachment, (*c*) and he would have received the notice had it been mailed him; and where (*d*) proof of publication was not on file when the judgment was rendered, (*e*) no entry in the records showed that a notice had been mailed to defendant and (*f*) the clerk was unable to testify that it was mailed.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Oliver, appellant, was complainant in the court below; Baird and another, appellees, were defendants there. From a decree dismissing the suit complainant appealed to the supreme court.

The object of the suit was to enjoin and annul a judgment obtained against complainant, as a nonresident, in an attachment proceeding in the circuit court, where judgment had been taken against him by default. The bill charged that the appellant never had any notice of the attachment proceeding until after the judgment had become final, that if notice had been sent him by mail it would have reached him, that he called regularly for his mail, and that his post office address was well known to the plaintiff in the attachment proceedings. Proof of publication was not on file at the time of the entry of the judgment by default, and there was and is now no docket or other record entry in the circuit court showing that notice was ever mailed to appellant, and the clerk of the circuit court had no recollection of ever having done so.

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Brief for appellant.

Thomas J. O'Neill, and *Alexander & Alexander,* and *Geo. B. Power,* for appellant.

"The rule that a record is conclusive evidence of its own verity is not applicable in a direct proceeding instituted for the purpose of showing its falsity as to a matter which, if false, shows that the court pronouncing it as a judgment had no jurisdiction of the person of the defendant, and, consequently, that what purports to be a record is in fact no record at all. No consideration of public policy requires that one guilty of no negligence should be concluded by *ex parte* proceedings, of which he had no notice, because of a declaration made by the court, at the instance of his adversary, that he had such notice. . . . If the summons was not served the court had no power to adjudicate that, or any other fact, against her, and the whole fabric falls, unless she is forced in the outset to admit as true that which she avers to be false and that too when upon its truth depends her liability to its burden and upon its falsity her right to relief. We reiterate what was said in *Sivley* v. *Summers,* that, in direct proceedings instituted for the purpose of testing the validity of the judgment 'the truth must prevail though the record fails.' Relief may be sought through the interposition of the chancery court." *Duncan* v. *Gerdine,* 59 Miss., 550.

"A judgment pronounced without service of process, actual or constructive, and without a defendant's knowing that a court has been asked to adjudicate upon his rights is regarded with such disfavor at law that a variety of motions, writs and proceedings are there provided to overthrow it; and in many courts it is at all times and upon all occasions liable to be disregarded entirely upon having its jurisdictional informity exposed. But proceedings in equity are peculiarly appropriate for the exposure of this informity." Freeman on Judgments, sec. 495.

In this case there is no contention, and there could be none, that the appellant, who was the defendant in the attachment proceedings, had any actual notice of the instituting of the at-

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Brief for appellee.

tachment suit or of its pendency. He is absolutely uncontradicted in his statements that he never heard of the institution or pendency of the suit until long after the judgment attacked had been rendered and then he learned of it only through a letter received from a correspondent in Columbus to whom he had written with reference to other business—some insurance matter. If notice was ever mailed to him by the clerk, he never received it.

There is no positive proof that notice was ever mailed to him; the clerk, when testifying in the chancery proceedings, could not recall the time, nor the occasion, nor the kind of notice that he sent or claimed to have sent and there was no docket entry of any such mailing from which any conclusion could be made; he could only say that he had mailed it because it was his general custom to mail such notices; he had absolutely no independent recollection of the incident.

It is a fact, as shown by the record, that, at the time of the rendition of the judgment in the attachment proceedings in the circuit court, there was no "proof of publication" before the court; true, the judgment recites that the cause came on for hearing on "declaration . . . proof of publication on defendant Tyre S. Oliver, and proof of mailing to said defendant, etc.," but it is the falsity of these very recitals in the judgment that is attacked in the chancery proceedings.

"It is the uniform and unbroken course of decision, that, under all statutes which authorize the substitution of some other means for personal service of process, as a foundation for the jurisdiction of the court, the most exact compliance with those requisitions will be enforced. Unless such compliance be shown affirmatively, the proceedings will not be sustained." *Kerr* v. *Bowers,* 1 Smed. & M., 588.

William Baldwin, for appellee.

If there be anything in human testimony, the fact is proved beyond doubt, that the proper notice of this attachment was

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published in the Columbus Commercial, a newspaper printed and published in Columbus, Lowndes county, Mississippi, for for three consecutive weeks, just prior to the November term 1902 of the circuit court of Lowndes county, Mississippi, to which term of court this attachment was returnable. It is the fact of the publication alone, that the law is concerned about.

Counsel for appellant give themselves much worry about the paper known as "proof of publication" of this notice. The law nowhere requires that what is called "proof of publication" be made and filed in the papers. What the law does require is the fact of the publication, and it matters not whether any "proof of publication" ever be made by the newspaper men and filed in the papers of the cause.

Section 1803 of the Annotated Code provides a way that proof of publication may be made, and when such is done that it "shall be evidence" but it does not pretend to be anything but directory or to suggest that it is the only method of providing that a publication has been made. But on the contrary, § 143 of the Annotated Code, the attachment method, provides that publication shall be made and notice sent to post office of defendant by the clerk, and the clerk shall make it appear to the court that he has done so—clearly showing that the manner of "making it appear" is to be left to the court to whom it is to be made to appear, for that court alone can judge of what is sufficient to "make it appear" satisfactory to it, that the proper publication had been made to give it jurisdiction to proceed further. Counsel for appellee cite *Wood* v. *Page,* 55 Miss., 107, to sustain their contention, but the commonest examination will show that there is no support in that case for their position.

The case was a direct appeal from a judgment by default on what was claimed to be insufficient notice—a course that Oliver should have pursued on February 25, 1903, instead of going into a court of equity. The Code of 1871, § 1477, of

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the attachment chapter, permitted judgments by default on "proof of publication" of the notice thereof, and the court held on this direct appeal, that the statute must be complied with and the "proof of publication" made.

Section 143 of the attachment chapter of the Annotated Code requires no such thing.

It provides that publication must be made and notice mailed, and that it must be made to appear to the court that such has been done.

But waiving all other questions and conceding that there was never any notice by publication given defendant, Oliver, the fact remains that the property sold was seized by the sheriff of Lowndes county, Mississippi, under the attachment writ, and sold by him, and this is sufficient notice to give the court jurisdiction in all cases over the property itself, and controversies over it; in other words, the levy of the attachment writ upon the property of the defendant is sufficient notice to him of the suit so far as that property is concerned, and gives the court jurisdiction to proceed to sale of that property. *Bull* v. *Ware,* 34 Miss., 147; *Ridly* v. *Ridly,* 24 Miss., 654; *Cooper* v. *Reynolds,* 10 Wallace, 308.

But even if it be true that the circuit court was without jurisdiction to proceed to judgment and sale of this property as was done, a court of equity has nothing to do with it.

This defendant's right was clear and untrammeled to have appealed from the judgment of the circuit court, and if the record disclosed want of jurisdiction to sustain it, this court would have reversed it.

If error there was, direct appeal or *certiorari* would have corrected it at once. 16 Am. & Eng. Ency. L. (2d. ed.), 374.

MAYES, J., delivered the opinion of the court.

The facts in this case show that the judgment entered was a void judgment. This being true, the facts here bring the case clearly within the rule laid down in the case of *Duncan*

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Statement of the case.

v. *Gerdine,* 59 Miss., 550, and resort to a court of equity under the circumstances was proper. At the time judgment was rendered in this case the record shows that there was no proof of publication before the court.

For these reasons, the cause is reversed and remanded.

STEPHEN LEACH *v.* HELEN HIRSHMAN.

[44 South., 33.]

DEEDS. *Undue influence. Fairness of transaction. Burden of proof.*

A deed executed by an infirm and feeble-minded person for an inadequate consideration will be cancelled by a court of equity in the absence of evidence showing the fairness of the transaction and the grantor's capacity to make the deed.

FROM the chancery court of Lowndes county.

HON. JAMES F. MCCOOL, Chancellor.

Leach, appellant, was complainant, and Mrs. Hirshman, appellee, defendant in the court below. From a decree in defendant's favor the complainant appealed to the supreme court.

Leach purchased the land in controversy from one Christopher in 1885, giving his note for $350 therefor, secured by a trust deed on the property. He took possession, and improved, cultivated, and occupied the premises as his homestead. The note was afterwards transferred to one Gross, who afterwards assigned it to Mrs. Hirshman. Leech kept up the payment of interest and taxes from the date of his purchase, and had twice renewed the note, and averred that he had made payments on the principal, for which he claimed credit. In 1900 Mrs. Hirshman induced Leech to execute to her a deed conveying the land, the deed reciting a consideration of $350. Leech, however, continued to occupy the property after its execution and paid taxes thereon as before and on the trial of the case testified that he had no recollection of ever having executed the deed. In 1904 Mrs. Hirshman began

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Brief for appellant.

to assert title to the land, and Leech instituted this suit to cancel the deed and for an accounting.

Thomas J. O'Neill, for appellant.

The case of *Culp* v. *Wooten,* 79 Miss., 503, s.c., 31 South., 1, is in many respects almost identical with the one presented by this record. In the language of the court in that case (p. 507) "Whatever the real facts may be, it cannot be gainsaid that there is testimony tending to show that this illiterate old man was the victim of a fraud, by which he was deprived of everything he had on earth, of land and personal property, accomplished by a violation of trust and confidence." Words directly applicable to the case of appellant here. Further from the same opinion: "It might be inferable from the record according to the *rationale* of human transactions that Hirshman (in this case) wanted this negro's land in preference to the payment of his debt."

The original bill of appellant charges that when called upon in January, 1900, to execute a paper to appellee that by reason of his illiteracy he did not know what it was and the proof shows conclusively that he was infirm, aged and imbecile, and that he was overreached and defrauded, and that he never parted with the possession of his home.

While inadeqacy of consideration is not a distinct ground of defense at law or relief in equity, "Yet it is evidence of fraud which is both; and while, as evidenced it is ordinarily entitled to a very little weight, standing alone, yet when it is coupled with other circumstances showing overreaching or oppression, or when the parties stand in such relation that this will be presumed, inadequacy becomes a material element of constructive fraud." Here we have an aged, infirm, illiterate man, who for many years had been trading with the husband of appellant, herself and her son, who was shown by the son to have been, all of his life, peculiar, but confiding in those whom he believed to be his friends, and whose homestead is

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Brief for appellee.

shown by two or more of his nearest neighbors, themselves large land-holders, to be worth $8 or $10 per acre, gratuitously making a deed for an alleged indebtednass which the proof in the case shows had long since been overpaid, and after making this deed we have the pitiful spectacle of this old man making his annual pilgrimage to the courthouse to pay his taxes and according to the testimony of the little "Shylock" son of appellee, persisting in paying the taxes when notified not to do so, and the further remarkable act on the part of Hirshman himself in charging the old man up with the tax on the land after he had taken the deed from the appellant and according to his account paid the taxes on the land himself; these and other facts show conclusively that appellant never knew that he had made a deed and that appellee and her son never dared to advise him of the fact until years had rolled by and that the information when given to the family of the old man resulted, a few days later, in this suit; all going to show that a fraud had been perpetrated and the old man's home taken from him by means and under circumstances that cannot be sanctioned and upheld by this court. 6 Am. & Eng. Ency. Law, 699, and authorities there cited.

William Baldwin, for appellee.

The pretenses upon which the appellant sought to vacate his own deed were so flimsy, as a matter of fact, so poorly supported by evidence, that the chancellor had no trouble in reaching the conclusion that they were spurious and simulated. His decree ought not to be reversed, nor will it be unless the great weight of the evidence be against it. The weight of evidence is not determined by courting witnesses. There is abundant testimony to support the decree, and the testimony of the complainant's witnesses bears internal evidence of its unworthiness; in fact much of it falls, but little, if any, short of perjury. We confidently rest on the finding of the court below.

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Opinion of the court.

Argued orally by *C. H. Alexander,* for appellee.

MAYES, J., delivered the opinion of the court.

We are unable to agree with the chancellor in his view of the facts in this case, and think he should have canceled the deed executed by Leech to Mrs. Hirshman on the 1st day of January, 1900, and ordered an accounting to be had, charging Leech with the amount of his note, with interest, and crediting him with all sums paid by him on this note to the original or any subsequent holder of same. The testimony in the case leaves it doubtful who is now the lawful owner of any balance that may be due on this note, if there is any balance due, and we leave this question to be settled by the chancellor. When the account is properly stated, if it be found that any sum is still due on this land as purchase money, it should be charged as a lien on the property in favor of such person as the chancellor may find to be entitled to same, and Leech should be ordered to pay whatever may be due to the parties properly entitled thereto, in default of which the property should be sold for the purpose of paying same. In stating the account, all overcharges, or improper charges, or usurious charges, if any, should be eliminated, and the rule in regard to partial payments applied, as required by § 2351 of the Code of 1892. If it shall appear that Leech has paid Mrs. Hirshman more than was due, he shall have judgment for any overplus.

The record in this case shows that Leech is between eighty and one hundred years old. At the time this deed was made to Mrs. Hirshman he was infirm, of feeble intellect, and seems to have no recollection of ever having made the deed, and though the deed was made in 1900, and there were several members of his family living on the place with him, none of them seem to have known it until nearly four years after the deed was executed, when for the first time, so far as they knew, Mrs. Hirshman began to assert title to it. After the

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deed was made Leech and his family continued to live on the place, just as they had done prior to that time, paid taxes on it, and not only were charged with the taxes on this land in the account rendered, but were charged with interest on the taxes. When this deed was made, Leech prior to that time had executed a deed in trust on the land to Mrs. Hirshman in renewal of the former note, and when she undertook to close it out, instead of having it sold at public auction, she procured him to execute to her a deed to the land for the purported consideration of $350. At the time this deed was made, the weight of testimony shows, even if he was due this amount, that this eighty acres of land was modestly worth $6 per acre, or $480, or $150 more than the amount which was claimed to be due. If Leech was due the amount claimed at that time, he was entitled to have any overplus of value paid to him, in the light of the facts in this record. This $150 to him, speaking from this record, was an enormous sum. The record shows that though the original purchase price to be paid for this property was $350, and though the property was bought in 1885, nearly twenty years before this suit was instituted, he has had great difficulty in ever collecting together enough to discharge this sum. Therefore this excess of value amounted to a great deal to him.

The proof shows that he did not possess sufficient intellect to make any valid contract; that is to say, he was almost a centenarian, feeble of mind and body, and under these circumstances, after these facts were shown, it devolved upon appellee to show the most perfect fairness of this transaction, and the capacity of Leech to make the deed, and we think appellee has utterly failed to do so. We cannot give our sanction to a deed obtained under these circumstances. In a case of this character, where the mortgagee obtains a deed from the mortgagor by private agreement, and still retains title to the property, nothing but the utmost fairness will prevent the deed from being canceled at the instance of the mortgagor. Leech

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Brief for appellant.

is shown to have reached extreme old age, and his intellect and memory suffered such impairment as would make him easy prey. If the creditor collect his debt, he surely cannot complain that he is not permitted to reap an advantage over one of impaired intellect.

Reversed and remanded.

MOSES C. WEYBURN v. ANNA L. WATKINS ET AL.

[44 South., 145.]

1. TRUSTEE'S SALE. *Deed of Trust. Inadequacy of price.*

A sale of land made by a trustee in a deed of trust, otherwise valid, will not be set aside for mere inadequacy of price, unless it be so great as to shock the conscience.

2. SAME. *Notices of sale. Defects. Date.*

Notices of a trustee's sale, complying with the terms of the trust deed and the law, which clearly and properly give the time, terms and place of sale, are not invalidated by an erroneous date written under them.

3. SAME. *Principal and surety.*

The right to sell existing, a surety cannot complain of a trustee's sale of lands any more than a principal debtor.

FROM the chancery court of Monroe county.

HON. JOHN Q. ROBINS, Chancellor.

Weyburn, appellant, was complainant in the court below; Mrs. Watkins and others, appellees, were defendants there. From a final decree in defendants' favor the complainant appealed to the supreme court. The facts are fully stated in the opinion of the court.

Thomas J. O'Neill, and *D. W. Houston,* for appellant.

The assertion that Clifton advertised and sold the property on January 20, 1902, "In conformity with the requirements of the deed and our statutes" is not only unsupported by the

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pleadings and evidence but the contrary fact is established, that a gross and misleading blunder was made and the sale according to Clifton's published notice had taken place already some ten or more months prior to the day on which the advertisement was made. *Finner* v. *Tucker,* 6 R. I., 551.

Appellee in her brief attempts to treat the error made by Clifton as trustee in his attempted sale of the land under the trust deed, and I submit to the court in all candidness that in his theorizing and supposing counsel successfully states himself out of court. He says: "Suppose the public stood before the bulletin board any day between the 19th of December, 1901, and January 20, 1902, to read this ad., for the purpose of acting on it. They would know that it had not been posted in December, 1902, for they would be looking at it there one year or eleven months before the day on which it was dated. This would show where the error was, etc." What sort of reasoning is this? How would the public know anything about what was intended or meant? Now would they not have been in the frame of mind that eunuch found himself when reading the Scriptures and the Apostle Philip drew near to him and asked him whether he understood what he was reading and he answered "How can I understand unless I have some one to explain to me?" How could the public understand anything about this advertisement on the bulletin board in the absence of an interested apostle who should have stood there as Monitor and Prophet to explain what that advertisement meant.

The case of *Graham* v. *Fitts,* 53 Miss., 307, referred to by appellee does not touch the question under consideration. It simply holds that where thirty days' notice is required of a trustee's sale that it is not necessary if the notice is properly made that it should remain up the entire thirty days.

The case of *Tyler* v. *Herring,* 67 Miss., s.c., 6, South., 840, referred to is really an authority in favor of appellant. It is held in this case that a proper conveyance by a trustee is *prima*

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facie evidence of the performance of necessary ministerial acts before sale. It, however, proceeds further and says: But this is a mere presumption and if there is evidence to impeach the sale, one who attacks it is not required to show by a preponderance of the evidence that such acts were not performed." What application these authorities have upon a case where it is shown that the advertisement in question while it remained upon the bulletin boards showed that a sale had already been made eleven months before, we fail to comprehend. The practical effect of this error was to give no notice of the time when the sale would be made. If it had been designed to mislead the public and to prevent bidders from appearing at the sale so that interested persons could obtain the property at a sacrifice, no better scheme could have been devised.

The contention of appellee that all matters complained of in this case were involved in the suit in the circuit court of Illinois is made in the face of the record of that suit, or more properly speaking, that part of the record of that suit to be found in the record before this court. We make this qualification because it is an imperfect and incomplete transcript of the records and proceedings in the Illinois court.

That record shows simply that under the old common law form of declaration, plaintiff there, appellee here, declared upon the covenant in the deed from Cleaver to appellant, that an attorney, evidently with limited experience, simply filed what he regarded as a plea of the general issue; that when the case came on for trial plaintiff there proved the execution of the Cleaver deed and the alleged sale by the trustee and the alleged deficit of $2,000 and rested, and that the court very properly declined to allow defendant there to present any proof as to the value of the property or otherwise, and gave a peremptory instruction for plaintiff. No other question was before the court or could have been and under the issues as presented the sole question determining that case was that appellant had assumed the debt on the land.

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Brief for appellant.

The statement in the brief that the value of the land and the matters of the advertisement and sale and all other matters complained of in this suit were gone into in that case is wholly erroneous and finds no place in this record outside this brief, and the conclusions of counsel are in direct conflict with the decisions of our own and other courts.

The many questions involved in this proceeding were not litigated in the common law action in the circuit court of Illinois, and what is more, they could not have been litigated there, because that court as is shown by the proof in this case has no equity jurisdiction.

In *Clay County* v. *Chickasaw County,* 76 Miss., 418, s.c., 24 South., 475, it is held that "A judgment in a previous suit does not support a plea of *res adjudicata* in a second suit between the same parties, if the claim propounded in the second was not, and could not have been litigated in the first." That is the law in Mississippi, and it will not, I presume, be even suggested that the judgment of any other court of a sister state or a foreign country would or could be placed upon a more favorable basis than judgments of our own courts.

"A purchaser having assumed the payment of an existing mortgage and thereby become the principal debtor, and the mortgagor a surety of the debt merely, and extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser without the concurrence of the mortgagor, discharges him from all liability upon it." Jones on Mortgages,, sec. 742.

This principle covers our case exactly. Appellee recognized and treated Gregory as a principal debtor, and as admitted in the answer in response to the charge in the bill, she made a valid verbal agreement with Gregory for the extension of the debt for one year upon his agreeing to pay the interest for that year. That is for the year 1902. He had not then paid the interest and taxes for 1901, but was permitted by appellee to collect the rent for 1901 from Clifton, the

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agent of appellee who had collected the rent for the year 1901 from the tenants on the property. The records then showed the deed from appellant to Gregory and hence appellee was advised of the fact, and by her transactions with Gregory showed that she was so advised that appellant stood in the relation of surety to Gregory and under the authority above quoted she released appellant when without his consent she extended the payment of the debt and interest, and this fact was never heard or thought of in the common law court of Illinois where the judgment in controversy was rendered. 27 Am. & Eng. Ency. L., 489, where the doctrine is discussed and the principle contended for upheld.

W. H. Clifton, and *Trusdell & Smith,* for appellees.

On the proposition that the notice of the trustee's sale bearing date December 19, 1902, when it fixed the sale at January 20, 1902, was misleading and avoided the sale. No such construction or effect could be given such a clerical misprision, for when analyzed it will be seen to be entirely harmless.

Suppose the public stood before the bulletin board any day between the December 19, 1901, and January 20, 1902, to read this "ad." for purpose of acting on it. They would know it had not been posted in December, 1902, for they would be looking at it there one year or eleven months before the day on which it was dated. This would show where the error was and the material matter, the day of sale and the posting of it is clear and uncontradicted. Suppose you erase the date December 19, 1902, entirely; you have in the "ad." then all the law requires. If it be merely surplusage, then how can it be seriously contended it avoids the sale. *Graham* v. *Fett,* 53 Miss., 314; *Tyler* v. *Herring,* 67 Miss., 171, s.c., 6 South., 840.

All this would be different, if the mistake had been made over the time or place of sale; and appellant's authority when

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examined will show that the courts were dealing with mistakes as to the time and place of sale shown in the "ad."

Another contention is that no actual notice was given appellant of the trustee's sale. The deposition of W. H. Clifton taken in the Illinois case shows that he wrote letters to both Moses C. Weyburn and Clarke S. Gregory advising them of the sale and the reasons why the sale would be made; and that these letters were never returned to him. But they were not entitled to actual notice; and the letters sent them show how careful and considerate the trustee was of their rights. Code, 1892, § 2484; *Williams* v. *Dreyfuss,* 79 Miss., 245, s.c., 30 South., 633.

WATKINS, Special Judge,* delivered the opinion of the court.

Upon the 23d day of October, 1896, Miss Eckford, of Aberdeen, Miss., who was the owner of two hundred and forty acres of land in Monroe county, Miss., conveyed the same to George F. Cleaver for a consideration of $3,960, $825 of which was paid in cash and the balance evidenced by the four promissory notes of the grantee, due December 20, 1897, 1898, 1899, and 1900, respectively, bearing interest at the rate of eight per cent per annum from their date; the notes being secured by a deed of trust covering the land conveyed, in which instrument W. H. Clifton was named as trustee. Some time during the year 1897 Miss Eckford, by assignment, transferred this indebtedness, with the security for the same, to Mrs. Anna L. Watkins, the appellee. This indebtedness, upon payment of the interest and the taxes on the property, was extended from year to year until the 2d day of February, 1901, when Cleaver conveyed the land to the appellant for a cash consideration stated in the deed, and upon the appellant expressly assuming and agreeing to pay the indebted-

* CHIEF JUSTICE WHITFIELD, being disqualified in this case, recused himself and WILLIAM H. WATKINS, ESQ., a member of the supreme court bar, was appointed and commissioned to preside in his stead in this case.

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ness owing by Cleaver to the appelleee, being the indebtedness secured by the deed of trust referred to. On May 2, 1901, appellant conveyed this land to one Clark Gregory, upon the said Clark Gregory paying a stated consideration and the express assumption by the said Gregory of the aforementioned indebtedness. It appears that the interest was not paid upon the indebtedness for the year 1901 by Clark Gregory, as he agreed to do, and at the request of the appellee W. H. Clifton, trustee, advertised the land for sale. The land was advertised December 19, 1901, in strict accordance with the terms of the deed of trust; notices being posted in three public places in Monroe county, Miss., for thirty days prior to the date of the sale. It appears, however, that W. H. Clifton, trustee, in dating the notices, erroneously dated them December 19, 1902, instead of December 19, 1901, and the notices announced the sale would take place January 20, 1902. At the sale the appellee purchased the lands for $7 per acre, being the highest and best bid therefor. The amount bid for the land at the trustee's sale was credited on the notes, and a demand was made on the appellant, who then resided in the state of Illinois, for payment of balance of $2,060, and, on the failure of the appellant to pay the deficit, suit was filed by appellee in the circuit court of Lee county, Ill., on April 3, 1903. This suit resulted in a judgment in favor of appellee against appellant on May 16, 1904, for the full amount of her demand. A motion for a new trial was entered in the cause, which motion was overruled by the court, and no appeal taken from the judgment. On September 13, 1904, an attachment suit was begun on this judgment in the circuit court of Noxubee county, Miss., against appellant as a nonresident, and certain lands owned by the appellant in that county were levied on under the writ, and since the filing of the original bill in this cause and prior to the final decree entered therein this attachment suit resulted in a personal judgment against the appellant for the full amount of the judgment

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recovered by appellee in the circuit court of Lee County, Ill.

On December 20, 1904, the appellant exhibited his bill in the chancery court of Monroe county, Miss., in which he makes Clifton, trustee, and appellee Mrs. Watkins, defendants. Among other things the appellee alleges that the sale made by Clifton, trustee, to the appellee, on January 20, 1902, was made for a grossly inadequate price, and that the requirements of the deed of trust and of the law governing such sales were not complied with, and the same was invalid and illegal, and that the deed from Clifton, trustee, to the appellee, conveyed no title. The prayer of the appellant's bill is that the sale made by Clifton, trustee, to appellee, be declared void and set aside; that the appellee be allowed to redeem the land, and a commissioner be appointed to sell the same. The chancellor in the court below, after hearing the proof, dismissed the appellant's bill, and from the decree so doing this appeal is taken.

The question which presents itself in this record is as to whether or not the sale made by W. H. Clifton, trustee, was a valid sale of the land in question? The testimony establishes the fact that the land was sold for about forty per cent of its actual value. It is settled law, however, in this state, that a sale of land made by a trustee, otherwise valid, will not be set aside for mere inadequacy of price, unless the inadequacy is such as to shock the conscience. While the sale of this land was for less than its actual value, we would be unwilling to disturb the sale on that account.

It is next contended by the appellant that the sale is defective because of the erroneous date at the bottom of the notices posted by the trustee. The notices stated that the land would be sold upon the 19th day of January, 1902, and the public were clearly and properly apprised of the time, place, and terms of the sale. The law deals with the contents of the notices, and with the lapse of time between the posting and the date of the sale, and not with an erroneous date inadvertently affixed thereto by the scrivener. According to

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the undisputed testimony, the notices were posted for more than thirty days prior to the sale. The sale was fairly and legally conducted, and every requirement of the deed of trust itself and of the law was strictly complied with. There is no pretense that there was any unfairness on the part of the appellee or of the trustee in conducting and making the sale. We are therefore of the opinion that the mere misdating of the notices on the part of the trustee does not render the sale invalid. We have carefully examined the case of *Fenner* v. *Tucker,* cited by learned counsel for the appellee, reported in 6 R. I., 551. In that case the notices of the sale stated that the land would be sold in one year, while, as a matter of fact, the land was sold in a subsequent year; whereas, in the present case, the notices correctly apprised the public as to the time, place, and terms of the sale, and the only mistake was the dating of the notices December 19, 1902, instead of December 19, 1901, which was a mistake of the scrivener, and in our judgment does not affect the validity of the sale.

It is further contended by counsel for the appellant that when the appellant conveyed the land in question to Clark Gregory, he himself was no longer liable to the appellee as the principal debtor, but was liable only as a surety, and that the extension of the indebtedness by W. H. Clifton, attorney for the appellee, during the year 1901, discharged the appellant from all liability on the notes, but the question is irrelevant to a proper determination of this case, because, whether the appellant was liable to the appellee as a principal debtor or merely as a surety, she had the legal right, upon default having been made in the payment of the indebtedness, to have the lands sold for the payment of her notes.

We are there therefore of the opinion that the judgment of the court below was correct, and the case should be affirmed.

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Statement of the case.

WILLIAM W. LAKE v. ADDISON BRANNIN ET AL.

[44 South., 65.]

MECHANIC'S LIEN, *Materialmen. Code* 1906, §§ 3058, 3074. *Nothing due mechanic. Accounting.*

An owner who employed a mechanic to furnish materials and improve a house for him is not, nor is the house, liable in a suit by third parties, materialmen, to enforce the lien given by Code 1906, § 3058, unless he be indebted to the mechanic on the contract price when notified, as provided by Code 1906, § 3074, of plaintiff's claim; and he is to be credited with any sum paid or agreed to be paid by him to others, before such notice, for materials used in the building.

FROM the circuit court of Monroe county.

HON. EUGENE O. SYKES, Judge.

Brannin, appellee, was plaintiff in the court below; Lake, appellant, was defendant there. From a judgment in favor of defendant the plaintiff appealed to the supreme court.

Lake, the appellant, entered into a contract with Wheelis & McCulla, a firm of carpenters, to make certain improvements on his residence for a stipulated price, they to furnish all labor and material necessary. Two parties from whom the carpenters obtained materials, to-wit, Rye and the McMillan-Paine Hardware Company, would not sell to them, but sold to appellant, and he obligated himself to pay these parties for any materials furnished the carpenters by them. In the meantime, Wheelis & McCulla had bought materials from other dealers, the appellees here. Afterwards, before the completion of the work, Wheelis & McCulla abandoned the contract. Thereafter the appellees served notice upon the owner that they had furnished material to the carpenters and had not been paid for same, and began suit in the court of a justice of the peace, seeking to enforce a materialman's lien. The

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Brief for appellant.

owner answered, denying that he owed anything to the carpenters at the time of the service of the notice, but admitted that he had a balance in his hands, which, if applied to the payment of the indebtedness due Rye, would leave him owing nothing whatever to the carpenters, and which amount he paid into court and sought to have the parties contest for the same. Rye refused to contest, and entered suit, and obtained judgment for the balance still due him. The same course was taken by the McMillan-Paine Hardware Company. Both judgments were satisfied. The case of Brannin and others, after the judgments above mentioned had been rendered and satisfied, went to trial, and they each recovered a judgment for the full amount demanded by them respectively. On the trial *de novo* in the circuit court both sides asked a peremptory instructions. The court granted plaintiff's request, refusing defendants.

Leftwich & Tubb, for appellant.

The proof shows that there was no contractual obligation or relation between appellees nor any of them and the appellant. The materials which these materialmen sold to the carpenters, Wheelis & McCulla, were sold solely on the faith and credit of the carpenters and without one word or syllable on the part of Lake, the owner, to pay for them. These materialmen simply sold their goods to a firm of insolvents, they took the chances and they lost. They do not pretend, any of them, to show or claim that Lake, the owner, had ever directly or impliedly contracted to pay for any of these materials. They seek now through this proceeding to establish a lien under the Code.

It will be observed that materialmen and subcontractors or employes, under the statute, can only bind by the written notice to the owner such sums as may be in his hands and due the contractor at the time of the service of the notice; at the time of the service of the notice the owner shall have paid the contractor already the sum which he agreed under

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his contract to pay him for the work, or if the payments made to the contractors and the debts assumed by the owner to others for the contract or to enable him to get materials and labor for the work aggregate the amount which he agreed to pay for the work, then in either case the notice cannot bind the owner to pay, if he has no funds in his hands at that time due the contractor. The statute never contemplated that the owner of the property when he makes a contract to erect a building or alter or repair a building or structure on his premises can ever be bound to any one, either the contractor or to laborers or materialmen for any sum over and above the amount he agreed and contracted to pay to the contractors for the work. It will be observed that in this case Lake, the owner, agreed by his written contract to pay the contractors $1,325 for the repairing and alteration of his residence. He can never be called upon by materialmen, subcontractors, laborers or employes to pay more than this sum to secure the performance of this work unless the parties who seek to enforce the payment can show contractual obligation with them upon his part upon which to base the action. In this case it will be observed that at the time the first notice was given by Brannin on May 4, 1906, Lake, the owner, had paid to the contractors the sum of $1,133.70. This money was paid to them, some of it in cash and some of it paid to others for labor and materials that went into the work. At that time, Lake had also agreed to pay Rye for all lumber and materials which he should furnish to the contractors to enable them to perform their contract. The contract with Rye was made two or three days after the original contract.

The owner certainly had a right to pay a debt that by his contractual obligation he had fastened on himself for materials furnished the contractors during the time the work was in progress, and it makes no difference whether the money actually passes out of the hands of the owner before the notice was served under the statute or after it was served. If

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he had in good faith assumed these obligations and had made himself liable for their payment, it is certainly his duty to pay them and it matters not whether they are paid before or after the notice is served. The very moment the owner assumes these obligations and makes himself legally bound for their payment, then that very moment the amount due by him to the contractors is diminished to the extent of the debts assumed. If this is not true, then no owner is ever safe in making a contract and thereafter paying to the contractor anything or to anybody for him for labor and materials during the progress of the work and until after the time limited in which subcontractors, materialmen and laborers may establish a lien. The following authorities sustain this doctrine: *Rosenbaum* v. *Carlisle,* 78 Miss., 882, s.c., 29 South., 517; *Academy* v. *Port Gibson,* 80 Miss., 517, s.c., 32 South., 116, 484; *Smith* v. *Gardner Hdw. Co.,* 83 Miss., 654; s.c., 36 South., 9; *St. Louis National Stock Yards* v. *O'Reilly,* 85 Ill., 546. See note to *French* v. *Bauer,* 20 L. R. A., 560, for last. 20 Am. & Eng. Ency. Law, 2d ed., 462, 463, note. *Harris County* v. *Campbell,* 2 Am. St. Rep., 467.

George C. Paine, for appellees.

The case ought to be affirmed because the testimony is overwhelming that Lake at the time of the notice and the other legal proceeding herein owed the contractors much money; that he has paid into court money that was due the contractors; that there is no one to pay this money to other than the appellees to whom the justice of the peace awarded the money under § 2714 of the Code of 1892.

MAYES, J., delivered the opinion of the court.

It is not pretended that Lake had ever in any way contracted with appellees to pay them for any of the materials furnished by them to the contractors and to Wheeliss & McCulla. If Lake is liable at all, he is liable by virtue of the

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statute and the proceedings taken by appellees under it, and in no other way. The fact that materials were furnished to the contractors and that the contractors put this material in the building creates no liability on the part of the owner, unless there is a concurrence of one of two things: (1) In order to create any liability on his part, he must have contracted to become responsible to the person furnishing the materials to the contractors for the building; or (2) at the time notice is served on him there must be something due by the owner to the contractor. Neither of the things which would create a liability on the part of the owner to the appellees existed in this case. After the most careful review of this record, the proof shows that when notice was served on the owner by appellees he owed the contractors nothing. He states this in his answer, and the proof conclusively shows this. It is true that he admits in his answer that there is $59.20 which he had not yet paid out at the time notice was served on him; but this amount is not due to the contractors at all, but it was due to Rye for material furnished the contractors to go into this building, by virtue of a contract that Rye had with the owner of the building, and for which the owner was responsible to Rye, and was not due to the contractors at all. It is also true that after service of notice on the owner by appellees he paid certain other sums that were due Rye and the McMillan-Paine Hardware Company; but these sums so paid after notice was served were not paid out of moneys that were due the contractors, but they were paid on an independent undertaking between the owner of the property and Rye and the McMillon-Paine Hardware Company, whereby the owner had obligated himself to buy this material to go into the house, and the same was charged to him and was his debt; and this contract with Rye and the hardware company was made, and the obligation incurred, long prior to the serving of any notice on Lake by appellees. The contract between Lake and Rye and the McMillan-Paine

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Hardware Company, whereby Lake became indebted to them for materials furnished by them which it was the duty of the contractor to supply, was made long prior to the time at which written notice was served on Lake by appellees of any claim that they had against the contractors. At the instant that Lake assumed this indebtedness to Rye and the McMillan-Paine Hardware Company the amount due the contractors under the contract with Lake was necessarily reduced in amount by whatever sum the material that was obtained from Rye and the McMillan-Paine Hardware Company amounted to.

We think the court should have granted the peremptory instruction, and the case is therefore reversed and remanded.

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FRANK N. BOWLES ET AL. v. PINK WOOD.

[44 South., 169.]

1. PARTITION. *Solicitor's fees. Code* 1906, § 3542; *Code* 1892, § 3119.

In an action for partition, where defendant's employment of a separate solicitor was essential to the protection of his rights, the court should not, under Code 1892, § 3119; Code 1906, § 3542, regulating the subject, charge defendant's interest in the land with any part of complainant's solicitor's fees.

2. SUPREME COURT. *Argument before special judge. Decision after his retirement.*

The losing party cannot claim that he was wronged because his case, argued in the absence of the chief justice before the other two judges of the supreme court and a special judge, was decided after the return of the chief justice to and the retirement of the special judge from the bench, although the chief justice delivered the opinion in the case and the two regular judges who heard the argument merely concurred.

FROM the chancery court of Leflore county.

HON. PERCY BELL, Chancellor.

Mrs. Wood, the appellee, was complainant in the court below, and Bowles and others, the appellants, were defendants

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Brief for appellant.

there. From a decree ordering a partition of lands the defendant, Bowles, appealed, and, because a solicitor's fee was charged against the share of Mrs. Phelan, one of the defendants, as well as against the shares of the other parties in interest, she prosecuted a cross-appeal.

The suit was for partition of lands and for an accounting for rents. The opinion of the court states the facts.

S. R. Coleman, for appellant.

It is incompetent to show by parol evidence the agreement whereby Jones & Son held the title to the property under their purchase at the execution sale. When the evidence of a resulting trust depends upon parol proof, it must be clear, strong, unequivocal and unassailable, and must establish the fact of the payment by the beneficiary beyond a reasonable doubt. *Miazza* v. *Yerger,* 53 Miss., 135; *Grayson* v. *Richardson,* 65 Miss., 225, s.c., 3 South., 579; *Moore* v. *Crump,* 84 Miss., 612, s.c., 37 South., 109.

On the former trial this case was argued orally, before a special judge, sitting in the place of the chief justice, and two regular judges, but before the opinion was delivered the special judge retired, and the chief justice resumed his seat on the bench; and the opinion was read by the chief justice. It is respectfully submitted, that in view of the former decisions of this court, the only way in which a valid judgment could have been rendered, would have been either by the special judge and his associates, or the cause should have been remanded for reargument.

The amount allowed by the commissioner was excessive. Appellant was charged rent based on the maximum instead of the minimum value of the land for a period of over twenty years. Certainly this was inequitable, inasmuch as the evidence shows that during such times, the rents were fluctuating, being at one period much higher than at another, throughout the whole course of the year. Moreover, the appellant should have

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had the right to hold, free of rent, his proportionate share of the land.

S. A. Morrison, and *McClurg, Gardner & Whittington,* for cross-appellant, Ida Phelan.

Cross-appellant, Mrs. Phelan, has not taken any side in this family litigation, has submitted to the partition of the land, and has accepted, without complaint, such share as was allotted to her. Not until the chancellor decreed that a solicitor's fee of $300 should be paid by her to the solicitor for the complainants, together with a large share of costs of court, did she think advisable to appeal. Neither she nor her counsel understand why she should be taxed with a solicitor's fee in a controverted case such as this. Her position is in some respects adversary to the complainants, *Walker* v. *Williams,* 84 Miss., 392, 36 South. Rep., 450.

Gwin & Mounger, for appellee.

This case has been pending for nearly ten years and, including the present appeal, has been before this appellate court four times. The first appeal was by the present appellant from an order overruling his demurrer to the original bill; the second was also an appeal by the present appellant from an order overruling one of his numerous demurrers, and was dismissed because prematurely taken. The third was from the decree adjudging title in appellees, and all of the pleadings now before the court were then before it. Surely there should be an end to litigation.

As to the adjudication of the title to the property, the decree, affirmed on last appeal, was a final and not an interlocutory decree. *Stebbins* v. *Niles,* 13 Smed. & M., 307. But whether or not such had been the case as concerned the lower court, we submit that, as regards matters in this court, the decision here was final, and cannot now be reversed, 2 Ency. Pl. & Pr., 373.

In support of the unusual contention that appellant has

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been deprived of property without due process of law because the judgment of the court on the last appeal was rendered by Chief Justice WHITFIELD instead of by special Justice HARPER, learned counsel for appellant refers to "former decisions of this court," without specific citation of the same. We presume he refers to the cases of *Moss Point Lumber Co.* v. *Harrison County,* 89 Miss., 448, s.c., 44 South., 1047, and *Hall Commission Co.* v. *Crook,* 87 Miss., 445, s.c., 40 South., 1006, as the same were referred to on argument of the case in the court below. In the first of these two cases both the original hearing and the rehearing were before the regular judges. The second case is decisive of the question here raised, that the special judge could not have participated in the rendition of the judgment of the court. Hence, there is nothing in such contention in this case now on appeal.

It is submitted that there is sufficient evidence to uphold the finding of the commissioner, and decree of the lower court based thereon, as to the rent charged against appellant. Several witnesses, including the sheriff of the county, testified that $5 per acre would not be excessive rent for the property, and the commissioner so found.

As regards the contention of Ida Phelan, cross-appellant, the pleadings show that she was made a party defendant to the bill of complaint, that she declined to answer, and decree *pro confesso* was taken against her. We submit that as she is benefited by the partition she would be chargeable with her share of the costs and expenses of the partition.

Argued orally by *S. R. Coleman,* for appellant, and by *Samuel L. Gwin,* for appellee.

HARRIS, Special Judge,* delivered the opinion of the court. This litigation was begun in September, 1897, and this is

* WHITFIELD, C. J., being disqualified recused himself in this case and J. B. HARRIS, ESQ., a member of the supreme court bar, was appointed and commissioned to preside in his place.

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its fourth appearance before this court. The esssential facts of the case, so far as they are necessary to be stated for a proper understanding of this opinion, are as follows: R. S. Bowles died intestate in 1878, owning two adjoining tracts of land in Leflore county; one tract containing eighty acres, and the other tract three hundred and twenty acres. He left surviving him as his heirs at law his widow, Mary Bowles, and five children, F. N. Bowles, P. B. Bowles, Pink Wood, Ida Phelan, and Julia Bowles. In 1873 a judgment was rendered against R. S. Bowles and Mary Bowles jointly in the circuit court of Grenada county for the sum of $468.78. After the death of R. S. Bowles—that is to say, in April, 1879—execution on this judgment was issued and levied on the three-hundred-and-twenty-acre tract of land, and the same was advertised for sale. At the time, F. N. Bowles was thirty-three years of age; Pink Wood, nineteen years of age; P. B. Bowles, seventeen years, and Ida Phelan, thirteen years. The widow, Mary Bowles, after making repeated efforts to raise the money to pay off the judgment, applied to Jones & Son, of Grenada, to lend money on the lands sufficient to pay off the judgment, which Jones & Son agreed to do; but, finding that the title was not in Mrs. Bowles, Jones & Son agreed to buy in the land and hold the same, giving Mrs. Bowles the right to pay the debt at some future time. Under an arrangement between F. N. Bowles and his mother and the other heirs, F. N. Bowles took possession of all the land, including the eighty-acre tract, in 1881, for the purpose of working out the debt with the proceeds of the land. In 1886 Mrs. Bowles died intestate. In 1890 Julia Bowles died intestate; F. N. Bowles still being in possession of the land. In November, 1889, F. N. Bowles, still in occupancy of the land, paid with the proceeds arising therefrom the amount due Jones & Son, and took title to the three hundred and twenty acres of land in his own name. At the time the other heirs, his cotenants, were not living

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in Leflore county. Mrs. Phelan was living in Grenada, P. B. Bowles in Arkansas, and Mrs. Wood and Julia Bowles elsewhere. None of them had any knowledge of the fact, at the time or until 1893, that F. N. Bowles had taken the title to this property in his own name. There seems to have been no accounting between the parties, but F. N. Bowles remained in occupation of the land from the time of his entry, receiving the income from the property and disposing of it at his discretion.

In 1897, after it had been learned that F. N. Bowles was claiming title in himself to the whole three hundred and twenty acres of land, Mrs. Pink Wood filed her bill in the chancery court of Leflore county, setting up the facts as above set forth, and asking for a partition of the land and for an accounting. F. N. Bowles and the other heirs at law were made defendants to this bill. The bill was demurred to. The demurrer was overruled, and appeal taken to this court, and a decree was affirmed (23 South., 1014), and F. N. Bowles required to answer. *Pro confessos* were taken against Ida Phelan and P. B. Bowles. It appears that after F. N. Bowles entered into possession of the land he acquired the interest of Mrs. Phelan and P. B. Bowles in the eighty-acre tract, so that at the time of the bringing of the suit he owned a three-fourths interest in the eighty-acre tract and admits that he held the eighty-acre tract as tenant in common with Mrs. Wood. After the cause was remanded, F. N. Bowles answered, and one D. L. Bain acquired the interest of P. B. Bowles in the three-hundred-and-twenty acre tract and was made a party to the suit; the *pro confesso* as to P. B. Bowles being set aside. There were many amendments and exceptions, a good deal of proof taken, and a final decree rendered, decreeing that F. N. Bowles held the land as tenant in common, and a partition of the land was ordered, and a commissioner appointed to take an account between the parties as to the rents and profits, etc. From this decree an appeal was

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taken to this court, and the decree affirmed in April, 1906, without written opinion. A suggestion of error was filed and overruled, and the case was remanded for the accounting which was afterwards had; and F. N. Bowles again brings the case to this court.

Through all the various pleadings and amendments had in the case, the consistent theory upon which the complainant's case relied was that F. N. Bowles, a tenant in common in possession of the lands, holding the same for common benefit, for the purpose of relieving it from debt, secretly acquired an outstanding title, which he was asserting against his cotenants. While Bowles controverts this fact, there was ample testimony to support the finding of the chancellor, and to maintain the complainant's case, and this finding of the chancellor, as stated above, was affirmed by this court. On this appeal the court is asked to reopen the case, to review its former decision and reverse the case on the merits.

The main contention of the counsel for appellant in his brief and in oral argument was that this was an attempt to establish an express trust by parol; that is to say, that it was incompetent to show by parol evidence the agreement by which Jones & Son held the title to the property under their purchase at the execution sale. But we think that on the real aspects of the case it is entirely immaterial as to how Jones & Son held the title. The case does not depend upon that fact. The true point for consideration was: Could F. N. Bowles acquire an outstanding title under the circumstances disclosed by the pleadings and the facts, and set it up as against his cotenants? The chancellor found, and his finding in this respect was affirmed by this court, that F. N. Bowles was occupying the land as a tenant in common at the time he acquired that outstanding title; that his cotenants were not aware of his having acquired this title, or of any intent upon his part to assert that title in himself adversely to them, until 1893; and that before the bar of the statute had attached the

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original bill in this case was filed. We find no sufficient reason on this ground for reviewing the former decision.

It is very earnestly urged by counsel for the appellant, as an additional reason for the court now reviewing its former decision, that this case was on the former appeal argued orally before a special judge, sitting in the place of the chief justice, and two regular judges, and that before the opinion was delivered the special judge retired and the chief justice resumed his seat on the bench, and the opinion was read by the chief justice, and that therefore some right of the appellant had been invaded. We think this point of counsel entirely without merit. It is true that the chief justice did read the opinion, and it is true that the special judge had retired from the bench; but two of the regular judges who heard the oral argument concurred in the opinion read by the chief justice, and the decision was the decision of the court and binding on the parties. We have said this much in review of the case, because it was so earnestly urged by counsel for appellant that the former decision in this case was wrong, and should be reversed; but the court adheres to its former ruling.

The real question for consideration on this appeal arises on the decree of the chancellor in confirming the report of the commissioner who stated the account between the parties. We think on this branch of the case, and on this alone, the decree must be reversed on the direct appeal on one point. The court is of the opinion that the amount of rent allowed by the commissioner was excessive. F. N. Bowles was charged rent at the rate of $5 per acre on the cultivated land from 1881 down to the time of the rendition of the decree. We think the proof on this point is that a fair rental for these lands would be $4 per acre, instead of $5. F. N. Bowles testified that the land was hard to rent, and that $4 was the best he could get, never over $4.50; and he is corroborated on this point by Avant, who had rented the land for some years, who knew it well, and testified that the land was hard to

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rent, that it was not well kept up, and that his land, which was very much better and in much better condition, brought only $5 to $6 per acre. It is also shown that throughout the time that F. N. Bowles was in possession rents were fluctuating, the value of land was much lower than to-day, and rent lower than it is to-day. Avant testified that for many years they were fully twenty-five per cent under what they are to-day, and we are therefore of the opinion that $4 per acre would be the proper rent for these lands, as an average for the whole time.

The case is here on appeal and cross-appeal. The cross-appeal is by Ida Phelan, one of the defendants below, and one of the cotenants. The chancellor found that Mrs. Phelan should pay a solicitor's fee of $300, together with her share of the costs, fee to go to the solicitors for the complainants; and from these parts of the decree of the chancellor Mrs. Phelan appeals. We think it is clearly error on the part of the chancellor to tax Mrs. Phelan with any solicitor's fee. This was a controverted case, and not a proper case, in our view, for taxing her with any solicitor's fee. Her position was really adversary to complainant. *Walker* v. *Williams,* 84 Miss., 392, 36 South., 450. She should, however, pay her proper costs, not including any of the cost for stating the account.

For the reasons indicated, and for those only, and to that extent only, the decree of the chancellor is reversed, both on the direct and on the cross-appeal, and the case remanded, to be proceeded with in accordance with this opinion.

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Brief for appellant.

LEO MINKUS v. WILLIAM H. ARMSTRONG.

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[44 South., 32.]

GAMBLING. *Futures. Recovery of money lost. Right of action. Code* 1906, § 2303. *Judgment of sister state.*

Prior to the enactment of Code 1906, § 2303, authorizing the wife or children of one paying money on a "future" transaction to recover it, a widow who recovered a judgment under a similar law in Tennessee could not maintain an action on the judgment in Mississippi.

FROM the circuit court of Lee county.

HON. EUGENE O. SYKES, Judge.

Mrs. Minkus, appellant, was plaintiff in the court below; Armstrong, appellee, was defendant there. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

Appellant recovered a judgment in the chancery court of Shelby county, Tenn., against Armstrong, appellee, for money lost by her late husband in dealing with appellee in transactions commonly called "futures."

The present suit was upon the Tennessee judgment.

J. M. Thomas, and *Sam Holloway,* for appellant.

The sole question therefore for the determination of this court is whether or not this court will refuse to enforce a judgment of a court of record of a sister state, the basis of which judgment is a recovery by a widow of a judgment for money lost by her deceased husband in dealing in futures.

It is a matter of common knowledge that most of the states of the Union now have statutes expressly authorizing the wife or widow to sue for money lost by her husband in gambling transactions, and it should be noted in the very beginning of

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this argument that such statutes are construed by the courts as remedial and not penal. This holding has been expressly sanctioned by the supreme court of the United States in the case of *Huntington* v. *Attrill,* 146 U. S., 657, 36 Law Ed., 1128. This opinion is by Mr. Justice GRAY, and he cites several authorities to the same effect.

The question above propounded, therefore, can be restated so as to read: "Shall the courts of Mississippi refuse to give full faith and credit to a judgment of a court of record of a sister state based upon a remedial statute of such sister state?"

The history of legislation in Mississippi in regard to recovery of money lost at gambling is rather curious and interesting. The Code of 1892 expressly provided in sec. 2116 that the wife could recover for money lost by her husband in gambling transactions. The supreme court in the case of *Isaacs* v. *Silverberg,* 87 Miss., 185, s.c., 39 South., 420, held that this section was inoperative, because it conflicted with sec. 2114, and the court declined to give any efficacy to sec. 2116, holding that the legislature clearly did not intend that the wife should be entitled to any such recovery. That decision was rendered on the 20th day of November, 1905. The legislature of 1906 re-enacted § 2116 of the Code of 1892 into § 2303 of the Code of 1906, and this action of the legislature shows beyond any question that it was the legislative intent that the wife or widow should recover for money lost by her husband at any game of chance. We take it, therefore, that the law in Mississippi at this date is beyond any question that a wife or widow could recover money lost by her husband in future deals.

But it is insisted by counsel for appellee that the provisions of the Code of 1906 did not go into effect until the first day of October, 1906, and that therefore the law upon this subject at the time of the beginning of suit by Mrs. Minkus, June, 1906, was the same as announced by this court in the case of *Isaacs* v. *Silverberg, supra.* It is true that the case did

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Brief for appellees.

not reach the trial judge in the court below for his determination until the middle of October, 1906, and therefore after the time fixed by the legislature for the new code to go into effect; but the trial judge took the position that in determining this cause he must be governed by the law as it existed at the time of the beginning of the suit and not by the law existing at the time such suit was before him for determination.

Bearing in mind that a statute permitting a wife or widow to recover money lost by her husband in future deals is a remedial statute, we are confronted with the proposition that the trial judge declined to enforce a remedial statute which was the law of the state at the time he was called upon to hear and determine this cause. The sole ground upon which such a decision can be defended is that it would be impairing vested rights. Or, to state the proposition in another form, the trial judge virtually held that a litigant has a vested right in the public policy of a state, and that, therefore the legislature could not pass a statute pending the determination of a suit which would change the policy of the state with reference to permitting a recovery in such suit.

That the legislature has the power to pass a remedial statute which shall effect pending litigation, is too clear for argument. *Green* v. *Anderson,* 39 Miss., 360; *Vaughn* v. *Swayzie,* 56 Miss., 704; *Excelsior Mfg. Co.* v. *Keyser,* 62 Miss., 155, 158; *Chicago R. R.* v. *Jones,* 24 L. R. A., 151; *Earley* v. *Geisecker,* 6 L. R. A., 533.

Anderson & Long, for appellees.

"Future contracts" were as valid at common law as any other contracts. 14 Am. & Eng. Ency. L. (2d ed.), 606.

"Such speculative contracts (futures) with brokers were valid at common law, are valid now in some states, would be valid in Mississippi, but for statutes." *Isaacs* v. *Silverberg,* 87 Miss., 185.

Under the statute of Tennessee, Shannon's Code of 1896,

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Brief for appellees.

§ 3159, gambling contracts are made void. Under sec. 3160, money won at gambling is not recoverable. Under sec. 3161, money lost and paid in a gambling venture may be recovered back within ninety days from time of payment. Under sec. 3162 the wife or children may, after the expiration of ninety days and within twelve months after the payment of money lost in gambling by the husband and father, recover the same. Under sec. 3163 in certain circumstances a creditor may recover money lost in gambling and paid by his debtor. Under sec. 3164 any person who sues for money won in gambling is made to forfeit $100, one-half of which shall go to the person suing therefor, and the other half to the county in which the action is brought. Under sec. 3165 any person negotiating any written instrument founded on a gaming consideration is guilty of a misdemeanor. Section 3166 declares that "future dealings" is gambling. Section 3167 declare "future contracts" void, and sec. 3168 makes dealing in "futures" a misdemeanor.

The legislature of Mississippi on the subject of gambling and "future contracts" is found in §§ 2114–2116 and 2117 of the Code of 1892.

The same provisions are found in the Mississippi Code of 1906 with the exception of the amendment to § 2117 of the Code of 1892, in § 2103 of the Code of 1906, giving the loser in a "future deal" or his wife or children, the right to "sue for and recover such money, property or other valuable thing so lost and paid or delivered," etc.

Under § 2114, Code of 1892; § 2300, Code of 1906, this court held that a suit on a judgment tendered upon a note given for a gambling contract (futures) can be defeated by showing the illegality of the original transaction. *Campbell* v. *National Bank,* 74 Miss., 526, s.c., 21 South., 400.

A judgment obtained upon a gambling contract is void by the statute, and equity will give relief although the defense might have been made a law; nor will it make any difference after the note on which the judgment is based, passes for value into

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Opinion of the court.

the hands of an innocent purchaser. *Lucas* v. *Waul,* 12 Smed. & M., 157; *Martin* v. *Terrell,* 12 Smed. & M., 571; *Smithers* v. *Keys,* 30 Miss., 179.

Since our statute making "future contracts" void, our supreme court has held that § 2114 of the Code of 1892 has the same application to that as to the ordinary gambling transactions.

Section 2116 of the Code of 1892, re-enacted in § 2302 of the Code of 1906, provides that the loser in an ordinary gambling venture, who has paid, may himself, or his wife or children, recover the same back. In construing this section in connection with § 2117 of the Code of 1892, amended by § 2303 of the Code of 1906, this court held that the loser in a future deal could not recover his losses. *Isaacs* v. *Silverberg,* 87 Miss., 185.

Future contracts made in another state, under the laws of which they are valid, cannot be enforced in this state. *Lemonius* v. *Mayer,* 71 Miss., 514, s.c., 14 South., 33.

A judgment recovered in another state, the consideration of which was future deals, cannot be recovered in this state, because immoral and against the laws and the public policy of this state. *Lum* v. *Fauntleroy,* 80 Miss., 757, s.c., 32 South., 290.

So it is plain that in this state until the Code of 1906 went into effect, neither the loser in a future transaction, nor his wife or children, could recover his losses from the winner.

Argued orally by *Samuel Holloway,* for appellant, and by *W. D. Anderson,* for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

Section 2303 of the Code of 1906 is not merely a remedial statute as contradistinguished from a penal statute. It confers the right of action on the wife or children of the party paying money on a future transaction, and on the party himself, to sue for and recover such money. At the time of the institu-

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tion of this suit, some months prior to October 1, 1906, there was no such right of action recognized by the laws of this state. See § 2116 of the Annotated Code of 1892, the cases of *Lemonius* v. *Mayer,* 71 Miss., 514, 14 South., 33, and *Campbell* v. *Bank,* 74 Miss., 526, 21 South., 400, 23 South.; 25, and § 2114 of the Annotated Code of 1892. The legislature plainly intended by sec. 2303, Code, 1906, to confer upon the parties named the right of action "to recover any money, property, or other valuable thing lost, paid, or delivered from the parties knowingly receiving the same" in any transaction known as "future deals." In this case the widow sued to recover under the laws of Tennessee, which confer the same right, and this action was brought in this state to enforce that judgment founded on future dealings at a time when no such right was conferred by the laws of this state. We do not decide at this time anything as to the right of the widow to maintain this action if she shall sue anew, now that sec. 2303 has become a part of our law and does confer this right. This decision is not to be understood as in any way prejudicing her right to bring such suit now.

Affirmed.

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Brief for appellant.

LAWRENCE WATTS *v.* STATE OF MISSISSIPPI.

[44 South., 36.]

CRIMINAL LAW AND PROCEDURE. *Continuance. Absence of witness.*

Where in a prosecution for murder the position of the body of the deceased when shot was material as determining the guilt or innocence of the accused, and there was no lack of diligence on his part to procure the attendance of the witness, the case should have been postponed on his application so as to secure the testimony of the person who was first upon the scene after the shooting and who placed the deceased in a bed before any one else arrived.

FROM the circuit court of Pontotoc county.

HON. EUGENE O. SYKES, Judge.

Watts, appellant, was indicted and tried for murder, convicted of manslaughter and appealed to the supreme court.

The case turned upon a question of a continuance, the facts in respect to which are stated in the opinion of the court.

Knox & Donaldson, for appellant.

The application of appellant for a continuance because of the absence of Brassfield, should have been granted by the lower court. The application stated that this witness had been duly subpœnaed, and had answered every call of witnesses in the case except just immediately before the trial; and that appellant expected to prove that he was the first person to appear on the scene after the killing, and who moved deceased before the inquest, placing deceased upon the bed before anyone else was present; and that appellant expected to prove by Brassfield that he saw deceased the day before the killing, running, with a pistol in his hand, after the appellant's father, and that Brassfield heard the deceased say, "I am going to kill both you and Lawrence Watts.

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Brief for appellant.

In *Long* v. *State,* 52 Miss., 23, this court said: "It is a dangerous exercise of judicial discretion to refuse a continuance and a postponement of the trial to a further day of the term, when the affidavit alleges material facts, where all diligence has been shown, and where it is averred that the same proof can be made by no other than the absent witness." Nor is the error in not allowing a continuance or passing the case, cured by permitting the defendant to read his affidavit for continuance in evidence. *Scott* v. *State,* 80 Miss., 197, s.c., 31 South., 710; *Montgomery* v. *State,* 85 Miss., 330, s.c., 37 South., 825; *Caldwell* v. *State,* 27 South. Rep., 816; *Whit* v. *State,* 85 Miss., 208, s.c., 37 South. Rep., 809; *Watson* v. *State,* 81 Miss., 700, s.c., 33 South., 491.

It is said in *Lamar* v. *State,* 63 Miss., 265, that a defendant cannot secure a reversal of his case if he fails to renew his application at the trial, and does not complain thereof in his motion for a new trial. We call the court's attention to the fact that appellant's motion was seasonably renewed at the trial, and the action of the court in not granting the continuance, was alleged as a motion for a new trial. There was no lack of reasonable diligence on the part of appellant to procure the attendance of the witness. The district attorney, himself, admitted that the evidence of Brassfield, if it should be as stated in the application for continuance, was material.

Certainly the circuit court should not throttle justice and strangle fair play by forcing the defendant, who has shown due diligence in getting ready for trial, to go into the trial entirely without witnesses. Yet if every witness subpœnaed by appellant, had been absent, and application for continuance been made for such reason, it must be presumed, judging by the action of the court as to Brassfield, that the appellant would have been forced into trial anyhow. The discretion which a trial court exercises in matters of continuance, must be judicial, not arbitrary; it is the guardian of the rights of the accused, as well as of those of the people at large. 9 Cyc., 167; *Hattox*

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Brief for appellee.

v. *State,* 80 Miss., 186, s.c., 31 South., 579; *Havens* v. *State,* 75 Miss., 488, s.c., 23 South., 181; *Scott* v. *State,* 80 Miss., 527, s.c., 31 South., 710; *Hill* v. *State,* 72 Miss., 197, s.c., 17 South., 375.

George Butler, Assistant Attorney-General, for appellee.

While the record shows that an attachment for the witness, Brassfield, was asked for, it nowhere shows that return was made thereon, nor is it shown that any further effort was made to have the witness present, either during the trial before the jury, or on the subsequent motion for a new trial; nor was appellant's affidavit for continuance because of the absence of Brassfield, submitted and read before the jury, nor any reason given why this was not done.

The appellant's application for continuance failed to set forth what was expected to be proved by the witness, Brassfield, with reference to the removal of the body; the application merely stating that there would be proof by the witness of the bare fact that he had moved the body of the deceased. It does not show that the witness was a freeholder or resident within the jurisdiction of the court; nor why the witness failed to appear in response to the attachment. We must presume that the court acted properly in overruling the application for continance. *Wells* v. *State* (Miss.), 18 South. Rep., 117.

The application does not meet the requirements of the rule announced in *Lamar* v. *State,* 63 Miss., 265. It is not in every case even where the desired testimony is material, and, in all probability, true, that this court will reverse the judgment of the trial court upon the grounds of its refusal to grant a continuance because of the want of such testimony. It is only in case the evidence adduced at the trial would impress this court with the conviction not merely that the defendant might have, in all probability, been prejudiced in his rights by the denial of such continuance, but that it was reasonably probable that

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if the absent witness had been present, and testified before the jury, a different result would have been reached by them. *State* v. *Cochran,* 147 Mo., 504–516, S. W. Rep., 558.

Even if the witness, Brassfield, appeared in person, and testified before the jury, it would, in all probablity, not have changed the result at the trial. *Hemingway* v. *State,* 68 Miss., 361, s.c., 8 South., 317.

Argued orally by *R. H. Knox,* for appellant, and by *George Butler,* Assistant Attorney-General, for appellee.

WHITFIELD, C. J., delivered the opinion of the court.

We think there should have been a continuance, or at least a postponement, of this case until the witness Brassfield could have been procured. The defendant in his application stated that he expected to prove by Brassfield that he was the one who moved the deceased before the inquest was held, and placed him in the bed before any one else arrived at said scene. Looking to the whole record as to the diligence of defendant in trying to procure Brassfield's attendance, we think it cannot fairly be said that there was any lack of reasonable diligence on the part of the defendant in this respect., The theory of the state, as frankly stated at the bar, is that this was a cold-blooded assassination, and the reliance of the state, for support of this theory, is upon the physical facts, location of the body, and the location of the blood on the bed and on the wall. If the testimony of the defendant is to be believed, it was a clear case of self-defense. It is not denied that the deceased was armed with a pistol. One witness states that he found the pistol lying at his right side in the bed and that the brains and blood were scattered all over the head of the bed, and on the ceiling and on one of the walls. He says the deceased's right hand was right where the pistol was, and he expressly states that the blood and brains on the wall were about four and one-half feet up from the floor. This is most significant in the

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case. It is extremely difficult to understand how this blood could have been that high upon the side of the wall if the deceased had been shot whilst he was lying asleep in bed.

Defendant states that the deceased shot at him with a pistol, and that the ball entered near the fireplace. There seems to have been a shot in the fireplace made by a bullet. One of the witnesses states that the place in the fireplace, where the bullet was supposed to have struck, looked like a fresh place; that it was not black right in the hole. He says the pistol was loaded all around when he saw it, but that there was one empty shell in the bed. When it is considered, in view of all this uncertainty as to the position the deceased was in when shot, especially when regard is had to the indisputable fact that the blood and brains were four and one-half feet up from the floor on the side of the wall, and when regard is had to the further fact that according to the application for the continuance Brassfield was the first man in the room, and that he is said to have placed the body on the bed, it certainly becomes clear that it was vital to the defendant's cause, and to a fair trial in the case, that Brassfield should have been secured and his testimony heard.

For the error of the court in refusing either to continue or postpone the case so as to secure this very vital testimony, the judgment is reversed, and the cause remanded for a new trial.

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Statement of the case.

CHARLES BEAMAN ET AL. v. EDWARD BEAMAN ET AL.

[44 South., 987.]

TENANCY IN COMMON. *Rights of Cotenants. Purchase of outstanding title. Wife of Cotenant. Husband and wife. Lands.*

Where the land of cotenants is subject to a superior lien granted by a former owner and is sold thereunder:—

(a) A purchase by one cotenant will inure to the benefit of all the tenants; and

(b) A purchase by the wife of one of the cotenants will likewise inure to the benefit of all of them, although married women have been wholly emancipated from common law disability on account of coverture.

FROM the chancery court of Attala county.

HON. JAMES F. MCCOOL, Chancellor.

Edward Beaman and others, appellees, were complainants in the court below; Charles Beaman and others, appellants, were defendant there. From a decree overruling defendants' demurrer to the bill of complaint the defendants appealed to the supreme court. The suit was for the cancellation of deeds under which some of the defendants claimed the land, and for a partition thereof between the parties in interest, with an accounting for rents, etc.

The land formerly belonged to one Alexander Beaman, who, in his lifetime, executed a deed of trust upon the same to secure a debt due to one of his creditors. Alexander Beaman died intestate, leaving the debt unpaid, and the land descended to his children, his heirs, as tenants in common. Thereafter the secured creditor caused the land to be sold under the deed of trust and the same was purchased by Joanna Beaman, the wife of Charles Beaman, one of the children and heirs of the original owner.

Each of the complainants is a child and heir of the de-

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Brief for appellants.

ceased Alexander Beaman; the defendants are: Charles Beaman, one of said children, and heirs; his wife, Joanna, the purchaser, as above stated, and persons holding under them.

The statute, Code 1892, § 3101; Code 1906, § 3526, authorizes controverted titles and all equities to be disposed of in partition suits.

S. L. Dodd, for appellants.

The attention of the court is invited to § 2289 of the Code of 1892, which was the law in force at the time Joanna Beaman purchased the land at the trustee's sale.

"Married women are fully emancipated from all disabilities on account of coverture; and the common law, as to the disabilities of married women and the effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and to do all acts in reference to property which she could lawfully do if she were not married; but every woman now married or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contracts in reference to it, and to bind herself personally, and to sue and be sued, with all the rights, and liabilities incident thereto, as though she were not married."

If the plain language of the law as above named imposed no disability upon Joanna Beaman, and she could acquire property, as though she were not married, "why could she not invest her money as she saw proper?"

To say that Joanna Beaman could not purchase land, and acquire title to it because she was the wife of Charles Beaman, who was a son of Alexander Beaman, is to impose upon her a disability that the law does not permit.

It is plain that if Joanna Beaman can acquire property after

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marriage as fully and as completely as before marriage, or as if she were not married at all, then for the court to hold that she was under disability to acquire property by reason of her being the wife of Charles Beaman would be to engraft an exception on the statute that it does not contain.

We are met with the argument of the counsel for appellee who cite, *Robinson* v. *Lewis,* 68 Miss., 69, s.c., 8 South., 258, which refers to a sale of land for taxes, where Lewis had purchased at a tax sale the interest of Criddle, his wife's brother.

That case has no application to the one at bar; Joanna Beaman was not a party, nor in any manner interested in the land sold by Fletcher, trustee, when she purchased the same.

She was under no obligation to pay off and discharge any lien or incumbrance on the lands of Alexander Beaman, deceased, because she was not an heir at law; no distress could have been had or taken against her on the default in payment of taxes on the land in suit by the heirs of Alexander Beaman, for she was not an heir, nor did she hold as in privity with the other cotenants.

It has been well said that the rule which prevents one spouse from securing the title where the other is disqualified, rested only upon a supposed privity of estate between them, but our statutes, above referred to, have wiped out and destroyed all such contention.

And we are again met by counsel for the appellee that Joanna Beaman could not prchase the land because public policy imputes to her those facts the existence of which precludes the other from action.

If that is the law, then the statute above referred to, which gives married women the right to acquire property as though they were not married, is abrogated by the courts, and the plain and manifest meaning of the law as written in the statute, is made to yield on some untenable ground, on a fiction, or a myth, when the plain letter of the law gives Joanna Beaman the same right to purchase the land and pay her money for

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it, as though she never knew in her life an heir of Alexander Beaman.

Luckett & Guyton, for appellees.

"A tenant in common who purchases the joint estate under a deed of trust will hold the same as trustee for all the tenants." *Smith* v. *McWhorter,* 74 Miss., 400, s.c., 20 South., 870; *Wyatt* v. *Wyatt,* 81 Miss., 219, s.c., 32 South., 317; *Walker* v. *Williams,* 84 Miss., 392, s.c., 36 South., 450.

If Charles Beaman was disqualified from purchasing the land at the trustee's sale, because he was a tenant in common, with the other heirs of the land sold, then he could not purchase same in the name of his wife for her nor could she purchase it in her own name. *Robinson* v. *Lewis,* 68 Miss., 69, s.c., 8 South., 258; *Hamblet* v. *Harrison,* 80 Miss., 118, s.c., 31 South., 580.

In both of the above cases the court uses this strong language: "If the rule which prevents one spouse from securing a title where the other is disqualified, rests only upon a supposed privity of estates between them, it might well be argued that our statutes upon the subject have destroyed its foundation. But the rule is founded upon consideration of public policy, and conclusively imputes to the one, as derived from the other, knowledge of those facts, the existence of which precludes the other from action. The opportunities that would be afforded for fraudulent practices would be so numerous and the difficulty of exposing them so great, that the courts apply the doctrine of estoppel to both, and thus close the door that offers the temptation."

CALHOON, J., delivered the opinion of the court.

Without especial consideration in detail of the various grounds of demurrer so ably argued, it is plain that appellant's case is without life if Mrs. Joanna Beaman, wife of Charles Beaman, could not buy, either for cash or on credit, at the

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sale by the trustee in the trust deed of Alexander Beaman, the ancestor. Charles Beaman was a cotenant, and, with his wife, was in actual possession of the land when his father died and when the trustee sold and she bought. If he had bought, the purchase, subject to what he paid in satisfaction of his father's debt, would plainly have inured to the benefit of all the cotenants, and himself as one of them. *Smith* v. *McWhorter,* 74 Miss., 400, 20 South., 870; *Walker* v. *Williams,* 84 Miss., 392, 36 South., 450; *Wyatt* v. *Wyatt,* 81 Miss., 219, 32 South., 317. The inability of a cotenant to buy for himself or herself is based on grounds of public policy. On the same grounds of public policy, the husband or wife cannot so purchase. *Robinson* v. *Lewis,* 68 Miss., 69, 8 South., 258, 10 L. R. A., 101, 24 Am. St. Rep., 254; *Clark* v. *Rainey,* 72 Miss., 151, 16 South., 499; *Hamblet* v. *Harrison,* 80 Miss., 118, 31 South., 580. It cannot affect this conclusion that it is held in *Means* v. *Haley,* 86 Miss., 557, 38 South., 506, that the wife of the selling tax collector may buy at a tax sale. This involves no question of cotenancy of the tax collector or the purchaser.

The fact that the law emancipating women, and giving them the same rights as men to acquire and hold and sell property, is of no avail to Mrs. Beaman. Her husband had the same right. The law of emancipation gives her no right superior to his; but neither he nor she, being his wife, could acquire adverse rights by purchase, because it is in contravention of public policy. Tender is unnecessary. The bill does not seek to stop any procedure, but recognizes the rights of Doty, the assignee, who must, of course, be protected.

Affirmed and remanded, with leave to answer within thirty days after mandate filed below.

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Statement of the case.

BANK OF INDIANOLA v. SAMUEL L. DODDS.

[44 South., 767.]

TAXATION. *Tax sales. Excess of bid. Tax collector's liability. Official bond. Interest on excess. Code* 1892, §§ 3820, 3824.

Under Code 1892, §§ 3820, 3824, regulating the subject, the liability of a tax collector, receiving from a tax sale purchaser a sum in excess of the taxes and costs for which the sale was made and retaining the same, to repay the excess arises when redemption from the tax sale is effected, and a failure to then pay over is a breach of his official bond; but he is not liable for interest on the excess before the redemption.

FROM the chancery court of Sunflower county.

HON. PERCY BELL, Chancellor.

Dodds, appellee, was complainant in the court below; the Bank of Indianola and one Carter, administrator of the estate of one Anderson, deceased, were defendants there. From a decree largely in complainant's favor the bank appealed to the supreme court and the complainant prosecuted a cross-appeal.

The bill sought to recover certain sums of money which were the excess bid by the purchaser of lands at tax sales over and above the taxes, damages, interest and costs for which the sales were made, herein and throughout the record called overbids, on lands bought by Dodds at tax sales, which lands were afterwards redeemed by the former owners. It was admitted that neither Dodds nor the former owners received the overbids in excess of taxes, damages, etc., and that Anderson, the former tax collector who made the sales, was liable therefor. The Bank of Indianola denied liability for the amount received by Anderson from Dodds prior to November 7, 1904, the date on which it became a surety on the tax collector's official bond, but admitted liability for amounts so received thereafter. The court below in its decree held the bank liable for all overbids

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Brief for appellant.

which Anderson failed to return to Dodds after redemption, since all redemptions were made after the bank qualified as surety, and that a failure to return the overbids to Dodds constituted a breach of the bond, but allowed interest only from October 11, 1906, the date on which the bill was filed, since no demand had been made of the bank prior thereto.

Baker & Moody, for appellant and cross-appellee.

Is the Bank of Indianola liable for the overbids collected by Anderson, as tax collector, on the first Monday of March, 1904, prior to the time said bank became a surety on the official bond of the said Anderson as tax collector, when it fails to appear that the said Anderson had the money on hand at the time the said bank became the surety on his bond as tax collector?

The record shows that the overbid of $1,364 was made and paid on March 7, 1904. The bond on which this suit is based is dated October 29, 1904, and was approved on November 7, 1904.

That the sureties on the bond in force at the time these overbids were made, to-wit, March 7, 1904, were liable for the same, is clear, unless they were relieved by reason of the execution of the new bond, with the Bank of Indianola as surety, which is dated October 29, 1904, and was approved on November 7, 1904.

By virtue of the provisions of the execution of the new bond the petitioning surety on the first bond is discharged from further liability on the bond, as to the performance of all official duties after the giving of such new bond. The fact that the new bond was executed did not release the surety, or sureties, on the former bond as to the performance of official duties, prior to the execution of the new bond, but only as to the performance of official duties after the giving of the new bond. Of course, as held in the case of *Lauderdale County* v. *Alford,* 65 Miss., 63, if it had appeared that the money col-

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Brief for appellant.

lected by the tax collector while the old bond was in force was in the tax collector's hands at the time the new bond was given, then, necessarily, liability as to this money would attach to the new bond, and for a failure to pay this money over, the sureties on the new bond would be liable.

This court, in the case of *Lewenthal* v. *State,* 51 Miss., 645, said that the undertaking of the sureties on the new bond is that the tax collector shall faithfully perform his duties as tax collector, and not that he has done so. "Their obligation relates to the future, and not to the past;" their obligation cannot be enlarged so as to include liability for *malfeasance* or *misfeasance* not embraced in the meaning of the terms used.

In the case referred to above, it appeared that the new bond was executed on December 2, 1893, and the question presented for the decision of this court was as to the liability of the sureties on the new bond, for taxes collected both prior to, and after, the execution of such new bond. In determining this question this court said that the "sureties on this second bond are only liable for the taxes collected by him (tax collector) after 2d of December, 1873. For taxes collected prior to that date, the sureties on the first bond are responsible."

That the Bank of Indianola, as a surety, was not liable for the overbid at the time it was collected, is clear; and we submit that the failure of the officer to pay money to the appellee, for which the Bank of Indianola, as surety was not liable, when he received it, did not create a liability against the bank, unless it was made to appear that the officer had this money on hand at the time the bank became a surety on his bond. This was not done in this case.

For all moneys collected by the tax collector prior to the execution of the new bond, the old bond is liable, unless it appear that such money was in the hands of the officer at the time the new bond was executed.

To adopt any other construction it would be necessary to

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Brief for appellee.

overrule the case of *Lewenthal* v. *State,* 51 Miss., 645, above cited.

J. W. Cutrer, and *P. C. Chapman,* for appellee and cross-appellant.

An examination of the statutes which control with reference to the liability of the former sheriff and tax collector Anderson, and the sureties on his official bond for the repayment of overbids paid by purchasers at tax sales, discloses a very great difference between the liability on such an account and that for the failure to pay over and account for taxes collected by him.

The duty to pay over taxes is one which occurs monthly at a stated time fixed definitely by statute.

The completeness with which the performance of the duty to pay over taxes may and should be enforced by the proper representatives of the state, is fully set forth and exemplified in the opinion of the court in the case of *Metts* v. *State,* 68 Miss., 132, s.c., 8 South., 390.

Aside from the fact that the duty of the collector in this respect may be enforced promptly and effectually, the law requires to be kept a record by the examination of which any person interested can ascertain when the first delinquency may appear in the official conduct of such an officer.

But with respect to the duties of this same officer concerning the disposition of moneys paid into his hands as overbids for lands purchased at tax sales made by tax collectors, the law is entirely different, and the same rules cannot be applied or enforced.

Primarily the purchaser must pay the amount of the overbid to the tax collector, otherwise the land sold will be resold.

After the payment to the tax collector, the owner is given the right to demand of the tax collector the amount of the overbid, and the tax collector is made liable on his bond for the payment of this sum to the owner on demand.

If the owner do not demand the money, then the fund must

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remain in the hands of the tax collector until the redemption of the lands, if redeemed, and in that event the money shall be refunded to the purchaser, and the tax collector's bond shall be liable therefor. See §§ 3820 and 3824, Code of 1892.

The law does not require the tax collector to keep any special records of the amounts of these overbids, nor to make report to any person as to when the same are paid out by the tax collector to the owner or purchaser, as the case may be, nor is any person interested in the amounts of the overbids save only the owner if he should apply therefor, or if not, but the property sold should be redeemed, the purchaser on such redemption, who is entitled to have the same refunded to him.

The amounts of these overbids are not made special deposits to be kept in the hands of the tax collector separate and distinct from other funds and moneys which may come into his hands.

All such sums are paid into his hands in current funds and there is no way for the owner or purchaser to trace them, and the tax collector only, and the sureties on his bonds are those persons only, who can and do know and who can disclose what disposition shall have been made of such funds, and when such disposition thereof may have been made.

There is no obligation imposed upon the tax collector to pay out the funds to the owner at any time, except upon the demand of the owner.

There is an obligation to pay out to the purchaser at a certain fixed time, and that is upon the date of the redemption of the lands sold by him, by the owner thereof.

If when the owner shall make demand upon the tax collector for the payment to him of the excess paid for his property at the tax sale, the tax collector should fail in his obligation to pay him a certain sum of money, to-wit: The amount of such overbid, at that time, a breach of the official bond of the tax collector would have occurred, and as § 3820 of the Code provides, such owner would then have a right of action against the tax collector upon his official bond, then in effect, for a

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breach of official duties of which the tax collector would then be guilty.

No right of action existed against the sureties upon the first bond executed by the tax collector in this case, during their period of suretyship, because no breaches of such a bond had been committed. The only right of action which has ever arisen in this case, is that in behalf of appellee, and that is as against the appellant and its defaulting principal.

Counsel for appellant relies entirely upon the rule announced by the court in the case of *Lewenthal* v. *State,* 51 Miss., 645.

In that case the suit was upon a delinquent tax collector's bond for the failure to pay over to the proper officer certain taxes collected by him.

As heretofore stated, there is an entirely different rule applicable where the suit is for the nonpayment of taxes collected, which are shown by certain records and where each payment can be particularly identified, and where each settlement is required to be made in a certain manner, and those evidenced by permanent records established by law.

It will not be presumed that the tax collector misappropriated the funds sued for prior to the time when the law made it his duty to pay over and refund the same to appellee.

Every presumption will be indulged in favor of the lawful conduct and demeanor of the tax collector. The presumption of innocence will prevail in civil as well as in criminal matters until overthrown by the proof of hostile facts. *Omnia præsumnuter rite et solemniter esse acta donec probatur in contrarium. Dyson* v. *State,* 26 Miss., 362; *Nebbett* v. *Cunningham,* 27 Miss., 292; *Wright* v. *State,* 50 Miss., 332; Lawson's Presumptive Evd., pp. 115, 116, 510, 511.

The chancellor declined to charge appellant with interest upon the amounts of overbids where redemptions were made prior to October 11, 1906, for the reason as stated, that it did not appear in the proof that appellee had ever made demand on

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appellant to make good the amounts of such overbids until by the filing of the bill in this cause.

On the other hand, appellee contended, and now contends, that it became and was the duty of appellant as the surety of the tax collector to answer to appellee for all damages suffered by him by reason of the default of the tax collector, and that these damages were and are the amounts of all overbids with legal interest thereon from the several dates the said tax collector should have refunded the same to appellee, and that the sums not having been refunded to appellee, he is entitled to interest thereon from the tax collector and his surety, without the necessity of a formal demand therefor upon the surety.

It is necessarily conceded to be the law that interest follows as an incident consequent upon the nonpayment of a debt or demand at the date it becomes due and payable, whether such date of payment be fixed by contract or arises out of a legal obligation otherwise imposed upon the person whose duty it is to make such a payment.

Whenever money is wrongfully withheld from the person entitled thereto, interest is invariably chargeable against such person by way of damages recoverable by the injured party. 11 Am. Eng. Ency. Law (1st ed.), 397.

WHITFIELD, C. J., delivered the opinion of the court.

The breach of the bond in this case is manifestly the failure to pay to the purchaser the overbids when the redemptions occurred. There had been no redemptions of any of the lands sold in March, 1904, prior to the execution and approval of the bond upon which the appellant is the surety. All the redemptions in the case were effected during the early part of the year 1906, except one redemption in April, 1905. The appellee paid $1,364 to the tax collector in excess of the taxes, damages, etc., at the sale in March, 1904, and $2,513 excess over the taxes, etc., due at the sale in March, 1905. The amounts of these two overbids were never repaid to the purchaser, the ap-

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pellee. The chancellor rendered a decree in favor of the appellee, but denied interest on all amounts of overbids from the date of the redemptions of the lands, where the redemptions took place before the filing of the bill, the 11th of October, 1906, allowing interest, in such cases, only from the 11th of October, 1906, and also allowing interest on the amounts of overbids, where the redemptions occurred after the 11th day of October, 1906, from the dates of the redemptions of said lands, respectively. From this decree the Bank of Indianola, the appellant, prosecutes a direct appeal, insisting that it is not liable for any sums representing overbids for lands purchased in 1904, on the ground that the collections for the land sold in March, 1904, occurred before the execution of this present bond, the 7th of November, 1904. Certain sureties petitioned to be relieved from the first bond executed by the tax collector, and this present new bond was executed, with appellant as surety, on the 7th of November, 1904. The appellee prosecuted a cross-appeal from so much of the decree of the chancellor as denied him interest on the amounts of overbids, to be calculated from the dates of the redemptions, where such redemptions took place prior to October 11, 1906.

The sections of the law involved are §§ 3819, 3820, and 3824 of the Code of 1892, which are respectively as follows:

"Section 3819. *Failure of Purchaser to Pay Bid.*—If the purchaser of land at tax sale shall not immediately pay the amount of his bid, the collector shall offer the land again and if some person will not then bid the amount of the taxes, it shall be struck off to the state, as in other cases; but the first purchaser shall be liable for the amount of his bid, to be collected by suit in the name of the state; and, on the same being collected, the tax list shall be cancelled as to that land, and it shall be conveyed by the auditor to the person from whom the amount has been recovered.

"Section 3820. *Disposition of Excess in Amount of Bid.*—If any land be sold for more than the amount of taxes due and

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all costs, the excess shall be paid to the owner on demand, and the tax collector shall be liable on his bond therefor; but if the owner accept the excess, and afterwards redeem the land from the tax sale, or defeat the tax sale in any way, or for any reason, he shall stand debtor to the purchaser for the amount thereof, with ten per cent interest from the date of sale, and the land shall be charged with a lien to secure the payment of the same."

"Section 3824. *Purchaser Entitled to Excess in Case of Redemption.*—If the purchaser bid at a tax sale, and pay over, a sum larger than the full amount of the taxes, damages, and costs, and the excess at the time of the redemption be in the hands of the tax collector, the same shall be refunded to the purchaser, and the collector's bond shall be liable therefor. In such case, if only a part of the land be redeemed, the excess shall be apportioned ratably to the amount of taxes due at the time of the sale on the respective parts."

The contentions with respect to the liability of the appellee as surety are as follows: The appellant insists that the breach of the bond occurred when the tax collector collected the amount of the overbids on the two sales—the first amount of $1,364 in March, 1904, and the second amount of $2,513 in March, 1905—and that consequently, of course, the appellant would only be liable as to the second overbid collected in March, 1905, and this it admits it is liable for. The appellee, on the other hand, insists, and manifestly correctly, that the breach of the bond never occurred, constituting the liability in this case, until the redemptions had been made, and it then became the duty of the tax collector to refund the amounts of the overbids to the purchaser. Undoubtedly this is the true view. The money remained in the hands of the tax collector from the dates of the sales, and he owed no duty of refunding the amounts of the overbids until the redemptions occurred. The moment the redemptions did occur there arose the legal duty on the part of the tax collector to refund to the purchaser

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the amount of the overbids. Failing to so refund, he became then liable on the bond for such breach of its obligation then in respect to this particular liability for the first time having occurred. The decree on the direct appeal is therefore correct. The case of *Lewenthal* v. *State,* 51 Miss., 645, is not in point here. It relates to a different subject-matter. There is a very great difference between the duties of a tax collector in respect to repaying overbids by purchasers at tax sales and paying over and accounting for taxes collected by him in accordance with the provisions of law on that subject. See *Metts* v. *State,* 68 Miss., 132, 8 South., 390. The liability in this case arose when, the redemptions having been effected, the tax collector then failed immediately to refund to the purchaser the amount of his overbids, and this failure occurred after the execution of this bond. No breach of the first bond occurred during the life of that bond. The only right of action which has ever arisen in this case is that in behalf of the appellee against the appellant and his defaulting principal for failing promptly to pay over to the purchaser the amounts of the overbids.

With regard to the cross-appeal it will be carefully noted that sec. 3820, *supra,* expressly provides that if the owner of the land shall accept the overbid, thus taking and using it, he shall pay interest at the rate of ten per cent per annum; but if the owner does not accept the overbid, and the amount of such overbid remains in the hands of the tax collector, sec. 3824 provides merely that the tax collector, when the redemptions shall have been effected, shall refund "the same"—that is, the amount of the overbid—to the purchaser. In other words, here are two statutes on the same subject-matter, one of which expressly provides for the payment of interest by the owner in case he takes and uses money, and the other of which expressly declares that the tax collector shall refund to the purchaser, where he keeps the money, only the amount of the overbid, saying nothing about interest. The tax collector cannot use the money as the owner might. He is to keep the

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Statement of the case.

money during the period of redemption, and, when redeemed, refund on demand the money thus kept on deposit. We do not think it was the intention of the legislature to require the payment of any interest on overbids, where the amounts of such overbids have merely remained in the hands of the tax collector, without having been used by him in his business. The scheme of the law is that the amount of such overbids shall remain simply on deposit with the tax collector to await the contingency of redemption. It is not intended that the tax collector shall use this money, and for that reason it was not provided by law that any interest should be paid on overbids to the purchaser when the lands are redeemed.

We think the learned chancellor was correct in all respects in his decree, and it is affirmed, both on direct and cross appeal.

Affirmed.

JAMES O. RAMEY *v.* WILLIAM W. WOODWARD.

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[44 South., 769.]

PRIMARY ELECTIONS. *Contests. Courts. Jurisdiction.*

In the absence of a statutory grant of jurisdiction in such cases the courts will not hear and determine contested political party primary election cases, although such elections are provided for and sought to be regulated by law.

FROM the circuit court of Lafayette county.

HON. JAMES B. BOOTHE, Judge.

Ramey, appellant, was plaintiff in the court below; Woodward, appellee, was defendant there. From a judgment in defendant's favor the plaintiff appealed to the supreme court.

Appellant and appellee were rival candidates at the Democratic primary election, held on August 22, 1907, for the office of clerk of the chancery court. The regularly constituted county Democratic executive committee met and counted the vote, as provided by § 3705, Code 1906, and declared appellee the

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nominee. Appellant demanded a recount, but this was refused him; whereupon he filed a petition in the circuit court, alleging various irregularities in the election, and asking for a trial by jury, as provided for contests in general elections by § 4186, Code 1906, claiming that § 3697, Code, providing that "all primary elections shall be governed and regulated by the election laws of the state in force at the time the primary election is held," etc., warranted contests in political party primary elections. Appellee demurred to the petition on the ground that the circuit court is without jurisdiction, having no authority to try contests between candidates of any political party under the primary election laws of the state. The court below sustained the demurrer and dismissed the petition.

W. V. Sullivan, for appellant.

Under sec. 3696 of the Primary Election Law, it is specifically and definitely provided:

"All nominations for state, district, county and county district offices, made by the different parties in this state, shall, hereafter be made by primary elections. All primary elections shall be governed and regulated by the election laws of the state, in force at the time the primary election is held, except as herein provided."

Careful reading and examination of the primary election law discloses that it does not provide for a contest.

The election laws of the state in force at the time of said primary do provide in express terms for such contest; as will be seen in § 4188 of the Code of 1908.

"A person desiring to contest the election of another person returned as elected to any office within any county may, within twenty days after the election, file a petition in the office of the circuit clerk of the county, setting forth the grounds upon which the election is contested; and the clerk shall thereupon issue a summons to the party whose election is contested, returnable to the next term of the court, which summons shall

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Brief for appellee.

be served as in other cases; and the court shall at the first term cause an issue to be made up and tried by a jury, and the verdict of the jury shall find the person having the greatest number of legal votes at the election."

It appears from the record in this case that the provisions of these two sections were followed to the letter.

A demurrer to the petition was sustained and an appeal taken. It is respectfully submitted, that these two sections must be construed together, and when so done, there is no logical or legal escape from the conclusion, that the petition was maintainable and that the court ought to have empaneled a jury and tried the case.

To hold that there must be a primary, as the only legal way to get on the ticket and at the same time to hold that there can be no contest however wrongful, the declared result would but put a premium on fraud, irregularity or rascality.

This matter must be argued and decided upon the statute, and citation of authorities is unnecessary and impossible.

Falkner & Russell, for appellee.

The circuit court has no jurisdiction of this cause. The primary election law of the state makes no provision for a contest except in § 3705 of the Code of 1906, it is provided that the county executive committee shall meet on the first or second day after each primary and shall receive and canvas the returns, declare the result and announce the names, etc.

It is clear that the legislature intended that all contests under the primary election laws of the state should be made before the executive committee. This is made clearer by an examination of the entire chapter of the Code on that subject—ch. 111, Code 1906.

It is insisted by counsel for appellant, that the language used in § 3697 of the Code of 1906, authorizes this contest under secs. 4186 and 4187—this cannot possibly be the true construction; the language is "All primary elections shall be

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Brief for appellant.

governed and regulated by the election laws of the state in force at the time the primary election is held," etc. What shall be governed and regulated by the election laws? Why, it is plain that it is the manner of holding the election, the printing and preparation of the ballot, the selection and conduct of judges and clerks, etc., and a failure to do so, subjects the one violating the law to indictment and the remedy of any person injured will be found in sec. 3705.

Suppose the officers do not comply with the law in holding the election and suppose there is fraud in it and illegal votes cast—what is the remedy? It is most certainly not to be found under sec. 4186, under which this petition was filed—that section provides for a contest in the general elections of the state—provides for an issue to be made up, a jury empaneled to try the case and to declare who is elected and entitled to the office. Here the court is asked to interfere with and declare fraudulent the primary election of Lafayette county —and to say whose names shall go on the ticket at the November election as the nominees of the Democratic party.

If the executive committee failed or refused to comply with the law, the only possible remedy is by mandamus, to compel them to perform a duty provided by law, and when the committee have performed their duty, there is no appeal from it to the court.

The jurisdiction of the court in this case can only be determined by a construction of § 3697, Code 1906, and by holding that it authorizes the remedy provided in the general election laws of the state in sec. 4186.
of the state in sec. 4186.

W. V. Sullivan, for appellant, in reply.

Appellant insists that the primary election law at present in force is entirely different from the primary election law of 1902, ch. 66, p. 105. The latter specifically provided in sec. 14 for an investigation full and searching on the part of the

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county executive committee and made it its duty to exercise this power.

This provision is entirely left out of the Code of 1906 and it is manifest that it was not intended to leave an injured or defrauded person wholly remediless.

Hence we insist the sec. 3697 expressly provided that the general election law shall apply. Section 4186 describes the proceedings for a contest. The two sections give the exact relief without which a premium would be put upon fraud and dishonesty.

The case of *Brewer* v. *Abbay,* 82 Miss., 559, s.c., 35 South., 153, was decided under the law of 1902, which constituted the executive committee the legal tribunal to try all these questions. That portion of the law has been repealed.

The case of *Shines* v. *Hamilton,* 87 Miss., 384, s.c., 39 South., 1008, taken in connection with the two above recited sections of the Code of 1906, that is 3697 and 4186, render clear the only reasonable construction to be placed upon the present primary election law, consistent with justice and the ordinary rules of construction.

MAYES, J., delivered the opinion of the court.

There is no provision in the law for the courts to entertain contests between rival candidates of a particular political party, and determine for that party which of the candidates shall be declared its nominee. Under the primary election law of this state, this right is wisely committed to the constituted authorities of the party itself, and their determination of it is final and conclusive. The only contests that the courts can entertain are those originating under general election laws.

Affirmed.

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Statement of the case.

WILLIAM Q. COLE, COMMISSIONER OF INSURANCE, v. AMERICAN SURETY COMPANY.

[44 South., 771.]

INSURANCE. *Regulation of agents. License fees. Surety companies. Agents. Code* 1906, § 3828.

Under Code 1906, § 3828, imposing a privilege tax of five dollars on an agent representing a surety company exclusively, such agent is not liable to any greater tax, although he do business in a city of more than two thousand inhabitants and other provisions of the Code impose a larger tax upon insurance agents in such cities and provide that surety companies shall be subject to the insurance laws of the state and the control of the insurance commissioner.

FROM the circuit court of, first district, Hinds county.

HON. WILEY H. POTTER, Judge.

The surety company, appellee, was plaintiff in the court below; Cole, Insurance Commissioner of the state, was defendant there. The suit was a mandamus proceeding to require defendant to issue to plaintiff a certificate of authority to an agent. From a judgment awarding the writ defendant appealed to the supreme court.

The agent of appellee at Jackson, Miss., a city of more than 2,000 inhabitants, applied to the sheriff and tax collector of Hinds county, in which Jackson is situate, for a privilege license to represent it, a surety company, exclusively in Hinds county, and paid the tax collector the privilege tax, five dollars, provided in § 3828, Code 1906, which section is found in the Code chapter on "Insurance." When the agent applied to the insurance commissioner for a certificate of authority, it was declined on two grounds, stated by the Insurance Commission thus:—

First, because the privilege license fee should have been paid

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Brief for appellant.

to the insurance commissioner, and not to the sheriff and tax collector; second, because the fee required by law was thirty dollars, the amount of the privilege tax on insurance agents doing business in a city of two thousand inhabitants or more (§ 3826, Code 1906), and that agents of surety companies were insurance agents, and liable to the same tax as other insurance agents, since they must obtain a certificate of authority from the commissioner, and all surety companies were under the control of the department of the insurance of the state.

The insurance commissioner having declined to grant the certificate of authority, the surety company, appellee, began suit for a writ of mandamus to compel the issuance of the certificate of authority. The insurance commissioner demurred to the petition, the demurrer was overruled, and, the commissioner declining to plead further, judgment final was taken, granting the writ.

R. V. Fletcher, assistant attorney-general, for appellant.

The question before us is as to whether agents for surety company are insurance agents, and liable to the same tax as other insurance agents or whether they are in a class to themselves. It seems to be perfectly clear that a surety company is an insurance company within the meaning of all our legislation on the subject, and that a contract of suretyship is an insurance contract. Thus § 2522 of the Code states that the term "company" or "insurance company" as used in the chapter on insurance, shall include among other things all corporations engaged in the business of guaranteeing the obligations of others. The terms of sec. 2563 are broad enough to include a surety contract within the definition of an insurance contract. Section 2567 deals with the organization of domestic insurance companies, and in the schedule of such companies is included (3d par.), companies organized to do a surety company business. Section 2615 of the Code undertakes to define insurance agents, and since a surety company is an insurance company by express

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Brief for appellee.

provision of sec. 2562, an agent of a surety company must be an insurance agent. It is evident that an agent for a surety company must, under sec. 2627, obtain a certificate of authority as much so as any other insurance agent. It is equally evident that such agent must pay to the commissioner the two dollars for a certificate of authority under sec. 2630.

Since the entire insurance chapter treats surety companies and their agents as insurance companies and insurance agents, it is difficult to understand how there can be any distinction made. Bearing these facts in mind it would appear that when sec. 3826 imposes a privilege tax of thirty dollars on every insurance agent doing business in a city of two thousand inhabitants or over, the language used must include agents for surety companies as well as other insurance companies. Section 3828 refers to surety company agents doing business in counties that do not contain any city of two thousand inhabitants, or to agents operating alone outside of such municipalities.

L. Brame, for appellee.

The question is whether an agent representing a surety or guaranty company exclusively, for each county, if he happens to do business in a town of more than two thousand inhabitants, must pay five dollars, under sec. 2838, or whether he comes under the general designation of an insurance agent and must pay thirty dollars, under sec. 3826.

A privilege tax is an unusual burden, and it is a general principle that laws imposing such taxes are strictly construed and whenever there is doubt as to the meaning or scope of such laws, they are construed most strongly against the government and in favor of the citizens. *Ex parte* Taylor, 58 Miss., 478; *Railroad Co.* v. *State,* 62 Miss., 105.

For special instances showing the strict construction of such laws as against the state, see the opinion of Judge BREWER in

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Brief for appellee.

Snyder v. *Lawrence,* 8 Kan., 82; *Sewell* v. *Jones,* 9 Pick. (Mass.), 412; *Brown's case,* 98 Va., 366.

Section 3826, Code 1906, clearly refers to and includes insurance agents proper. Then sec. 3827 provides a privilege tax to be paid by life insurance agents. Then sec. 3828, which is separate and apart from the others, provides for agents or guaranty or surety companies. These are put in a different class and are provided for separately. Neither in the contemplation of the statute, nor in ordinary acceptation is the agent of a surety company an insurance agent. No one would ever speak of the representative of a guaranty company as being in the insurance business.

Then let us look at the reason of the statute. Under sec. 3826 as we have stated, an insurance agent by paying a privilege tax of thirty dollars may represent a large number of insurance companies and do an immense business. Therefore, he is required to pay a larger sum. An agent of a guaranty or surety company does relatively a very small business, and, therefore, he is required to pay only five dollars in each county, and if he represents more than one surety company, he must pay five dollars for each company in each county. This surely is burden enough. It must be remembered, too, that under sec. 3820, each guaranty or surety company is itself required to pay a privilege tax of one hundred dollars for doing business in the state. The legislature never intended to put such a burden on these companies as would be imposed if the construction contended for by appellant is correct. There are a great many towns in the state of Mississippi having a population of more than two thousand inhabitants, and these are the only ones in which an agent for such a company would be established or could be maintained or pay the privilege tax required by law. To require the payment of the tax contended for by appellant would be to impose a harsh and unjust burden, one never contemplated by the legislature, and clearly not within the language of the law as written. To justify the imposition of

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such a burden on a doubtful construction would be to reverse the principles of law stated above and which are universally held to be applicable in cases like this.

Argued orally by *L. Brame,* for appellee.

CALHOON, J., delivered the opinion of the court.

The only question is whether an agent to solicit exclusively for surety company business must pay five dollars or thirty dollars for a single county, whether or not it has in its limits a city of a population of two thousand or more. The only other question is waived in the brief for appellants. The rule of strict construction applies to tax laws, and we are construing Code 1906, § 3828. This section requires a five dollar payment for each county by "each agent representing a surety company exclusively." The section is independent of all others, and, construed with secs. 3826 and 3827, draws a sharp distinction between insurance agents and agents for guaranty and surety companies. The legislature had the whole subject under consideration, and clearly makes this distinction when it comes to imposing a tax on the privilege, and it will be noted that sec. 3828 is silent as to cities of two thousand population or more, and we cannot interpolate these words without assuming to exercise legislative power. We are not shaken in this conclusion by the reference of counsel for appellant to other provisions of the Code, providing that surety companies shall come under the operation of the insurance laws and be subject to the control of the insurance commissioner. This does not make an agent of a surety company an insurance agent. Suffice it to say that, when the specific question of privilege taxation is considered by the legislature, it makes a difference between the two agents. Section 3826 refers to insurance companies according to the originally received import of the term, while sec. 3828 independently provides for privilege taxes

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Syllabus.

on the agents of guaranty or surety companies as a separate class.

Affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* SOLOMON GORTIKOV.

[45 South., 363.]

1. RAILROADS. *Passengers. Tickets. Ejection. Description of purchaser. Punch marks.*

A railroad passenger is not required to verify the punch marks placed on his ticket by the selling agent, and where the ticket described the passenger otherwise accurately, even noting the fact of his having a mustache, a conductor is not authorized to eject him because the selling agent by mistake punched the ticket for a female instead of a male.

2. SAME. *Return limit.*

Where by its terms a railroad ticket is good for a return trip until a given date, its limit is not shortened by punch marks in its margin, placed there mistakenly by the selling agent.

3. SAME. *Ejection. Punitive damages.*

The original purchaser of a return railroad ticket, if ejected by the conductor because the selling agent had erroneously punched his ticket for a female instead of a male, can recover both actual and punitive damages where the conductor, saying "this is a bogus ticket," ejected him without giving him an opportunity to explain.

4. SAME. *Contracts. Cautionary provisions. Unreasonable contracts void.*

A provision on a railroad ticket, printed under the head "Caution," to the effect that in cases of doubt between the passenger and conductor the passenger should pay the sum demanded by the conductor, take his receipt and report the same to the general office of the company, where the same would "receive prompt attention," is mere advice and not a contractual part of the ticket; but, if regarded as a part of the contract, it is unreasonable and void.

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Brief for appellant.

FROM the circuit court of Grenada county.

HON. JOSEPH T. DUNN, Judge.

Gortikov, the appellee, was plaintiff in the court below; the railroad company, appellant, was defendant there. From a judgment in plaintiff's favor for $1,000, embracing actual and exemplary damages, the defendant appealed to the supreme court.

The facts are sufficiently stated in the opinion of the court.

McWillie & Thompson, for appellant.

Before we can reach a just conclusion touching the motives, acts and declarations of the conductor it is proper to examine the face of the ticket a little closely in order to see the conductor's side of the case and to show, as we think it does show, that Conductor Goodwin did not act unreasonably. It will be seen that there are two errors on the face of the ticket as well as a suspicious circumstance well calculated to have led the conductor to the belief that the plaintiff was riding upon what the witnesses have denominated a bogus ticket. In the first place the ticket was good on the return trip only within ninety days from the date of sale stamped on its back and written on its face, but not later than December 31, 1904. On the back of the ticket was distinctly stamped Ocober 27, 1904. According to this Gortikov has the right to return upon the ticket, other considerations aside for the moment, until the 31st of December, but on the edge of the ticket under the head "Return Limit" are the words "This ticket will be void after the day and month in 1904 punched below," and then in the column just below the quoted sentence the month "December" is punched, which was correct, but the day "14" is punched out, which doubtless was an error. The point, however, is that in respect to the time when the ticket expired it was ambiguous on its face. The most conspicuous part of it showed that it had expired on December 14. It was not presented to the conductor until December 18. No man can say that Conductor Goodwin was not misled by

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the ambiguity on the face of the ticket. He tells us himself that he was so misled and there is not a word in the plaintiff's testimony by way of explanation of this point on the subject of the time when the ticket expired. There is something else on the face of this ticket which is even worse than an ambiguity. Under the head "Description of Passenger" the ticket is so punched as to show that its original purchaser and the person entitled to ride upon it was a female. Conductor Goodwin very well knew that Gortikov was not a female nor did that individual pretend to be one. This certainly was well calculated to make the conductor suspicious of the ticket at least. While the original purchaser is described by punch mark as being of medium size and height and of middle age, with light eyes and dark hair with no beard, this in no way throws any sort of discredit upon the punched indication that the ticket holder was a female, and the only punch mark which can be claimed to discredit the idea of the owner being a female is the one which describes her or him as having a mustache. Which discredits the other. A few women have mustaches. There is still another matter on the face of the ticket shown by Conductor Goodwin's testimony to have had great weight with him. The place of the signature "S. Gortikov" on the face of the ticket bears evidence, even without the aid of glasses, to have been abrased. Conductor Goodwin tells us in his testimony that it was perfectly plain to him that the signature had been tampered with, and while we would not have suspected the forgery, yet when we come to look at it closely, and it is the duty of the conductor to scan these matters carefully, we can see that the conductor was not without warrant in believing that the signature had been altered. These three things put together, the ambiguity on the face of the ticket touching the time of its expiration; the showing on the face of the ticket by the punch mark that the original purchaser and owner of it was a female and the apparent alteration in the signature on the face of the ticket were well calculated to impress the conductor, as in fact

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they did impress him, that Gortikov was seeking to ride upon a ticket to which he was not entitled.

The conductor acted in good faith in this matter and he demanded the payment of fare, five dollars and sixty-five cents, transportation charges from Memphis to Canton, which constituted the conductor's run. The conductor explained to Gortikov the difficulty about his ticket but Gortikov obstinately insisted that his own uncorroborated statement should be received as gospel truth in explanation, something he had no right to demand. Gortikov had money, nine dollars, more than sufficient to have paid his railroad fare to Canton, but he flatly refused and obstinately failed to do what the very ticket which he had bought at a reduced rate enjoined him to do; that is to say, in case of error on the part of an agent or question of doubt between the holder and the conductor the passenger was to pay the conductor's claim, take his receipt, the company agreeing to correct all errors in regard to it, etc. Gortikov ought not to have the benefits of the ticket and at the same time repudiate its burdens, the ticket being, as the one in question was, a special reduced rate ticket, and its provisions and stipulations and contractual obligations being as was the case before the court supported by a valid consideration.

Gortikov was ejected from the train at Grenada; no greater force was used than he himself rendered necessary to accomplish his expulsion. He stayed in Grenada four days awaiting remittances. His actual damages, allowing him everything claimed to its fullest extent, only aggregated $464.50. You can not spell out of this record another cent in his favor unless forsooth it can be said that a jury may regard whatever it sees proper for humiliation and that too when the circumstances are not such as to justify exemplary damages. The jury returned a verdict in plaintiff's favor for $1,000, thus demonstrating, we think, that because of erroneous rulings of the court, especially in the matter of instructions, it was carried off into the realms of

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exemplary damages, a matter in our judgment outside of this case.

The court below at the instance of the plaintiff instructed the jury that the provision on the ticket to the effect that in the event a controversy arose between the conductor and the plaintiff as to the right of the plaintiff to travel on the ticket that plaintiff was to pay the fare demanded and to have the same refunded by the company was an unreasonable requirement and not binding upon the plaintiff. It also instructed for the plaintiff, giving what amounted to a peremptory instruction, announcing that if plaintiff purchased the ticket entitling him to passage from Tucson, Arizona, to Chicago, and back, and had himself identified at Chicago, as the original purchaser of the ticket, and that he presented the ticket to the conductor for passage on December 18, 1904, that plaintiff complied, or was willing to comply, with his part of the contract, and that the conductor declined to honor the ticket and put plaintiff off the train, then the jury should find for the plaintiff.

The court also instructed for plaintiff on the subject of actual damages, including in the elements of such damages inconvenience and discomfort which plaintiff suffered by being expelled from the cars, adding that it was not necessary that the inconvenience and discomfort should be shown in dollars and cents.

The ninth instruction given for defendant was also modified by the court in two particulars, and the defendant declined the instruction as altered and it respectfully submits to the court that the modifications were improper. The modifications are shown by being embraced in parentheses.

The jury having rendered a judgment for $1,000 in favor of plaintiff, the defendant moved for a new trial, and the motion having been overruled the case is now brought to this court, all of the matters aforementioned having been made the subject of proper exceptions.

The Law of the Case.—There is a difference in law between an ordinary token ticket and a contract ticket, "if the

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ticket is a mere check, the passenger is not obliged to read conditions on its back, nor is he bound by them without his express assent. But, if the ticket purports to be a contract ticket, of a kind and size that no one who could read could glance at it without seeing that it undertakes expressly to govern the conduct of the parties until the passenger arrives at his destination, the passenger will be expected to read it, and if he fails to do so, he will nevertheless be bound by its lawful stipulations. The fact that it is not signed by the passenger will be immaterial, although any restrictions or limitations upon the passenger's rights must be supported by some consideration in the shape of a reduced fare or otherwise. But the fact, it is said, that the passenger pays a reduced fare for his ticket will be sufficient to put him on notice that the ticket may contain restrictions upon the carrier's liability, and, by accepting such a ticket, he will be bound by its lawful limitations." 2 Hutch. Carriers (3d ed.) § 1028 (§ 568). The passenger is bound by the terms of the ticket. 2 Hutch. Carriers (3d ed.), § 1053 (§ 580a), This doctrine is fully recognized in Mississippi. *Howard* v. *Chicago, etc., R. R. Co.,* 61 Miss., 194; *Wilson* v. *New Orleans, etc., R. R. Co.,* 63 Miss., 352. The ticket evidences the contract and the passenger is bound by its terms, although it be not signed by him. *St. Clair* v. *Kansas City, etc., R. R. Co.,* 77 Miss., 789.

A contract providing for the identification of the passenger is lawful, and if the passenger does not comply he may be rightfully ejected. *Mitchell* v. *Southern R'y Co.,* 77 Miss., 907. The *Holmes case* decides two things: (1) The initial line is not liable; and (2) the ejection was wrongful only because the passenger's explanation of the error in her ticket was reasonable and substantiated by her baggage check and the way bill for its carriage. *Ala. & V. R'y Co.* v. *Holmes,* 75 Miss., 371, s.c., 23 South., 187.

The *Holmes case* and the case of *Kansas City, etc., R. R. Co.* v. *Riley,* 68 Miss., 765, s.c., 9 South., 443, are limited.

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Brief for appellant.

Mitchell v. *Southern R'y Co.*, 77 Miss., 918, s.c., 27 South., 834. Ejection rightful if ticket had expired. *Mitchell* v. *Southern R'y Co.*, 77 Miss., 918, s.c., 27 South., 834. Contract binding passenger to have himself identified before beginning return passage good although not signed by him, and an expulsion for want of such identification is lawful without reference to passenger's statement touching the failure. *Mitchell* v. *Southern Railway Co.*, 77 Miss., 917, s.c., 27 South., 834; *Mosher* v. *St. L., etc., R. R. Co.*, 127 U. S., 390; *Boylan* v. *Hot Springs R. R. Co.*, 132 U. S., 146; *Bethea* v. *Northeastern R. R. Co.*, 1 S. E., 372, s.c., 26 S. Car., 321; *Abram* v. *Gulf, etc., R. Co.*, 18 S. W. (Tex.), 321; *Wenz* v. *Savannah, etc., R. R. Co.* (Ga.), 33 S. E., 970; *Baltimore, etc., R. R. Co.* v. *Hudson* (Ky.), 80 S. W., 454. Contract binding passenger to satisfy conductor of his identity, valid. *Southern R'y Co.* v. *Cassell*, 92 S. W., 281. The courts differ as to whether the party named to determine identity must determine whether he is "satisfied" or whether the law will treat him as being "satisfied" if in truth he ought to have been satisfied.

The South Carolina court makes the party named the judge of whether he was satisfied. *Bethea* v. *Northeastern R. R. Co.*, 1 S. E., 372; while the Kentucky courts hold that he was satisfied if as a reasonable man he should have been. *Southern R'y Co.* v. *Cassell*, 92 S. W., 281.

The Mississippi doctrine in regard to such contracts is that they must be treated as providing for an award by an umpire, selected by the parties for that purpose, and binding unless fraudulent. *Georgia, etc., R. R. Co.* v. *Brooks*, 66 Miss., 583, s.c., 6 South., 467. The United States supreme court adjudges the finding of an agreed person final in the absence of fraud or such gross mistake as implies bad faith or failure to exercise an honest judgment. *Maryland, etc., R. R. Co.* v. *March*, 114 U. S., 549.

Plaintiff must show joint contract in order to hold Illinois

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Brief for appellant.

Central Company for Southern Pacific Company's mistake; the sale of a through ticket does not prove even *prima facie* a joint contract. *St. Clair* v. *Kansas City, etc., R. Co.*, 77 Miss., 789; *Felder* v. *Columbia, etc., R. R. Co.*, 27 Am. & Eng. R'y Cas., 264, s.c., 215 Car., 35. Conductor not bound by passenger's uncorroborated statement. *Mitchell* v. *Southern R'y Co.*, 77 Miss., 917.

The case of *Illinois Central R. R. Co.* v. *Harper*, 83 Miss., 560, s.c., 35 South., 764, does not contradict this; there the passenger's statement was not only reasonable but it was not contrary to the contract evidenced by the ticket; it violated only an unknown regulation of the company.

If there be reasonable ground to dispute the right of a passenger to ride on the ticket he has, he should pay the additional fare demanded by the conductor, if able to do so, and damages cannot be increased by obstinate resistance and consequent ejection. *Gibson* v. *Tennessee R. R. Co.*, 30 Fed., 904; *Hall* v. *Memphis, etc., R. R. Co.*, 15 Fed., 67. There is a conflict of authority on this point; but the conflict arises in cases which do not involve the matter of contract. The decisions holding that the passenger is bound to pay fare are not unreasonable, surely not so much so as to render void a contract adopting the rule announced by them, the contract being freely entered into by the passenger, as in this case for a consideration. It will be noted that defendant did not contend in the court below, by requested instruction or otherwise, that a failure by plaintiff to pay the conductor's demand was of itself a defense; the contention was that the jury might consider such failure along with the other evidence *in estimating the sum to be awarded.* If it be said that the provision on the ticket to the effect that the passenger was, in case of a controversy with the conductor, to pay the demand made on him and look to the company for reimbursement is not of the contracts evidenced by the ticket but is a mere notice to the purchaser, the argument is not weakened, because his acceptance of the ticket charged him with notice

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of its contents and caused him to know that the procedure named was one which met the company's approval and his very silence on the subject was equivalent to his assent to it. Hutch. on Carrier (3d ed.), sec. 1028. He knew that his damages could be reduced by paying a small sum of money and he had more money than was necessary to make the payment. He preferred to be put off the train; to suffer the very things which he did suffer and for which he demanded, and was awarded, exemplary damages, rather than to pay five dollars and sixty-five cents. This was the estimate placed by the plaintiff himself on the suffering incident to his ejection, and the jury ought to have been permitted to consider it in estimating damages. Of course if the plaintiff were a mere adventurer seeking grounds upon which to bring a law suit, the case is even stronger on the point in appellant's favor.

It will not do to say that the refusal to pay the conductor's demand is of but little probative force; it certainly tends to diminish any recovery to which the plaintiff might be adjudged entitled, and besides, the probative force of the evidence is for the jury.

The contracts in the case:

(1) The time limit contract; held everywhere to be valid. *Mitchell* v. *Southern R'y Co.*, 77 Miss., 917, s.c., 27 South., 834.

(2) The plaintiff agreed to identify himself to the satisfaction of the defendant's conductor, and that if his identity was called in question the matter should be determined solely by the conductor. This is valid. *Southern R'y Co.* v. *Cassell* (Ky.), 92 S. W., 281; Hutch. Car. (3d ed.), sec. 1054.

(3) The plaintiff agreed that in case of error or any question between himself and any conductor he would pay the conductor's claim, take his receipt, etc., and the company bound itself to correct errors. No sensible reason can be given why such a contract is not valid, especially where the ticket is to be used on foreign roads.

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Brief for appellant.

The case of *Cherry* v. *Chicago, etc., R. R. Co.* (Mo.), 90 S. W. Rep., 381, s.c., 109, Am. Rep., 830, 850, 851, is against us to the extent of pronouncing the ticket stipulation unreasonable which requires the passenger to pay the conductor's demand and denies him a recovery if he fail to do so. Appellant did not ask the court, although the Kentucky case, *supra,* warranted so doing, to treat the passenger's failure to pay as a perfect defense but claimed only that the jury should be permited to consider the failure along with the other evidence in fixing damages in the event the verdict should be for the plaintiff. The Missouri case does not allow of a distinction between regular rate tickets and special ones. Under conditions of law heretofore allowed in this country, not violating any statute, state or national, can any reason be conceived why a full grown man might not, acting freely, voluntarily and for a valuable consideration, contract with a railroad company for transportation, over its own and another company's line of railroad and bind himself in the contract, in case of error or disagreement with a conductor, to pay that officer's demand and look to the seller of the ticket for reimbursement? Of course if such a contract be a *nudum pactum* it cannot be enforced, but if it be supported by a valuable consideration it is valid. The Missouri case tells us that the law does not require that a passenger shall buy that which he has already bought and paid for. Of course not, but his contract may require him to pursue a designated course of procedure upon the happening of certain events and his contract may obligate him to carry a sufficiency of money to pay as required to do by the contract. This is the whole of it.

The appellee's counsel tells us in his brief that he has been able to find four and only four cases in point, all of which he claims to be in his favor, but he cites only three cases, one of which, *Cherry* v. *Chicago, etc., R. R. Co.,* we have already noted and the other two are not in point. One of them, *Georgia R'y. etc., Co.* v. *Baker,* 125 Ga., 562, 54 S. E., 639, 7 L. R. A. (N.

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S.), 103, was a street railway case and a controversy about a "transfer" and some stipulations printed upon the transfer card. The pretended contract was simply void as a *nudum pactum*; the matter printed upon the transfer card was not brought to the attention of the passenger, he was not given an opportunity even to read it. See the quotation from Hutchison on Carriers on p. 17 of this brief. The other case cited, *O'Rourke* v. *Citizens, etc., R'y Co.*, 103 Tenn., 124, 76 Am. St. Rep., 639, was also a street railway case and the same observations are applicable to it; the contract there under consideration was a *nudum pactum*. When counsel wrote of four cases and only cited three he must have had in mind one other, *Southern R'y Co.* v. *Cassell* (Ky.), 92 S. W., 281, which is decidedly favorable to appellant.

Exemplary Damages.—"The conductor is not obliged to accept an improper ticket and in the absence of evidence of a willful omission of the first conductor (the one who issued it), to properly punch the transfer ticket or of the second conductor to accept it when he knew that his duty required him to do so, the company is not liable for punitive damages by reason of the passenger's ejection without insult, rudeness or unnecessary violence." *Vicksburg, etc., R. R. Co.* v. *Marlett,* 78 Miss., 872, s.c., 29 South., 62. Error in issuing an excursion ticket not cause for punitive damages. *Illinois, etc., R. R. Co.* v. *Moore,* 79 Miss., 766.

The case of *Illinois, etc., R. R. Co.* v. *Harper,* 83 Miss., 560, s.c., 35 South., 764, does not conflict with the *Marlett case* or the *Moore case*. The *Harper case* was peculiar; the woman was rightfully on the train according to the ticket, nor did the conductor misunderstand the ticket. He put her off because of an undisclosed regulation of the carrier.

Hutchinson, in 2 Hutchinson on Carriers (3d ed.), sec. 1065 after reviewing the authorities, lays down the rule to be "As between the conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence,

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Brief for appellee.

and he must produce it when called upon as the evidence of his right to the seat he claims. Where a passenger has purchased a ticket and the conductor does not carry him according to his demand, or if the company, through the mistake of its agent, has given him the wrong ticket, so that he has been compelled to relinquish his seat or pay him a second time in order to retain it, he would have a remedy against the company for a breach of the contract, but he would have to adopt a declaration relying upon such breach and not upon the ejection. The application of this rule does not extend, however, to the case of a passenger who has been furnished with a ticket on its face and declared by the company's agent to be good, but which in fact was not so according to the company's regulations," and the author cites *Illinois, etc., R. R. Co.* v. *Harper,* 83 Miss., 560, s.c., 35 South. Rep., 764, among other cases as supporting the text, thereby showing the distinction between the *Harper case* and the *Mitchell case* and the other Mississippi cases.

Mayes & Longstreet, on the same side.

William C. McLean, for appellee.

In *Riley's case,* 68 Miss., 765, 9 South., 443; *Drummond's case,* 73 Miss., 813, s.c., 20 South., 7; *Holmes' case,* 75 Miss., 371, s.c., 23 South., 187; *Harper's case,* 83 Miss., 561, 35 South., 764, it is squarely held by this court that the ticket is not conclusive evidence of the extent of a passenger's right to travel, and further that it is the duty of the conductor to accept any reasonable explanation offered by the passenger, and that the conductor is bound to accept the ticket, or take the risk of having the company mulched in damages, in the event the conductor makes an error. The only reason why the conductor did not honor this ticket, was, first, because he claimed that it was issued originally for a female; second, that the plaintiff was not the original purchaser, and third, that the right to ride

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Brief for appellee.

on the ticket had expired. The evidence in the case clearly demonstrates, first, that the plaintiff was in truth and in fact the original purchaser of the ticket. Second, that the time limit had not expired. While the punch marks on the margin of the ticket show that it expired on December 14 (the plaintiff was ejected on December 18) yet, the provision of the ticket provides that the ticket was good for a return trip, within ninety days from the date of sale stamped and written on the ticket, but not later than December 31, 1904. The ticket was sold on October 27, and, therefore, was good until December 31—less than ninety days intervening between the date of sale and December 31. The agent who sold this ticket testifies positively that if the punch marks indicate that the limit expired on December 14, it was a mistake. The rule is well settled in this state, first, that a railroad company cannot contract against its own negligence. *Railroad Co.* v. *Grant,* 86 Miss., 565, s.c., 38 South., 502. Second, that a passenger is not required to examine his ticket before entering upon a railroad journey, in order to ascertain whether it is correct or not; it would be prudent to do so, but not doing so, will not vitiate a contract that is made with a railroad company. *Railroad Co.* v. *Drummond,* 73 Miss., 720, s.c., 20 South., 7, and this court in *Holmes' case,* 75 Miss., s.c., 23 South., 187, says "the law does not require a purchaser of a ticket from a ticket agent to examine it, and see what it purports to be, though the ticket on its face is insufficient, the passenger who is ejected may recover for the ejection, when the passenger tells the conductor that he has paid his fare, and states the amount he paid to the ticket agent, who told him it was good. It is the duty of the conductor to accept the passenger's statement, until he finds out it is not true, no matter what the ticket contains in words, figures or other marks." *Riley's case,* 68 Miss., 765, 9 South., 443; *Holmes' case,* 75 Miss., 389, s.c., 23 South., 187. Hutchinson on Carriers, sec. 580j, and authorities cited on page 682. As a matter of fact, the conductor did not

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Brief for appellee.

eject the plaintiff because the punch marks indicated that the ticket had expired—this was a mere afterthought, because the conductor testifies that he never read the ticket, that just as soon as he laid his eyes on the ticket, he saw that the ticket originally was issued to a female, and that it was a bogus ticket; this question about the ticket having expired arose in the case, after the lawyers got in the case. But, however that may be, the proof is clear that the ticket had not expired. In addition to the proposition laid down and repeatedly affirmed by this court, that the ticket is not conclusive evidence of extent of a passenger's right to travel thereon, but that the passenger has the right to stand upon his contract, as originally made; but in addition to that, it is elementary that the whole of a written instrument will be looked to in construing it, and that this rule of contract is applicable as to the limit of time, within which the passenger has the right to ride on the ticket. See *Mitchell* v. *Railroad Co.,* 77 Miss., 922, s.c., 27 South., 834, in which this court says:—"In all these cases, it may well be said that the company's reservation must be taken most strongly against it, and it should have clearly fixed the precise limitation of use or passage." The ticket as shown on its face is ambiguous, and consequently the plaintiff had the right to use this ticket until December 31. This appears upon the ticket itself; but when we take into consideration the evidence (and there is no doubt but what the evidence shows that the agent in punching, made a mistake) it is clear that the contract, as was intended to be made both by the plaintiff and the Railroad Co. gave the plaintiff until December 31, in which to travel on the ticket. S. H. Cooper, the agent of the Southern Pacific R. R. Co., who sold this ticket to the plaintiff, testifies that the punch marks were evidently a mistake, and that the ticket was good until December 31.

The defendant relied upon the provision written on the ticket that, in case of error on the part of the agent, or question

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Brief for appellee.

of doubt between the holder and conductor, the purchaser should pay the rate claimed, take his receipt, and all errors or irregularities report to the general office, and the same will receive prompt attention. This provision is under the head of "Caution." In the first place, it is very clear upon an inspection of the ticket, that the above provision forms no part of the ticket. The ticket shows on its face that there are only ten provisions in the ticket, and the above is not one of those provisions. This provision also not only is not a part of the contract, but it was simply advisory. It simply advises the holder of the ticket that he could pay the claim, and that in the event of so doing, when the same was presented to the general office, would receive prompt attention. There is no provision that the amount paid would be refunded, but simply that it would receive prompt attention. All of the authorities agree that this provision is no part of the contract. Hutchinson on Carriers, secs. 580, 666, and authorities cited. But if this were a part of the contract, and had been expressly written in the contract, all of the authorities agree that such a provision is unreasonable and void. After a very close examination of the authorities upon this subject, we are unable to find but four authorities, and they all agree that such a provision is unreasonable and void, and not binding on the passenger. It is unnecessary to enter into a discussion of the question, as a full discussion will be found in the following authorities: *Cherry* v. *C. & A. R. R. Co.* (Mo.), s.c., 109 Am. St. Rep., 830; *G. R. R. Co.* v. *Baker,* 7 L. R. A. (n. s.), 103; *O'Rourke* v. *R. R. Co.,* 103 Tenn., 124, s.c., 76 Am. St. Rep., 639. All of the above authorities are squarely on this proposition.

The evidence shows that the plaintiff was willing to satisfy the conductor that he was the original purchaser of the ticket, but the conductor did not call on the plaintiff for any explanation whatever, but at once declared that the ticket was a bogus ticket, that had been originally issued to a female and was bought by the plaintiff from a scalper. Under such circum-

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Brief for appellee.

stances, the law is well settled that the passenger was not required to offer any explanation. *N. & W. R. R. Co.* v. *Anderson,* 96 Va., s.c., 44 Am. St. Rep., 884.

The evidence in this case clearly demonstrates, beyond the peradventure of doubt, that the conductor was guilty of wilfullness in ejecting the plaintiff. In *Harper's case,* 83 Miss., 569–570, s.c., 35 South., 764, this court held that it was not only the duty of the conductor to listen to the explanation, but having heard it as he did, it was a wrong, a wilful wrong warranting the imposition of exemplary damages to put the passenger off the train; that it was none the less a wilful wrong, because he acted in a gentlemanly manner, and was guilty of no insolent conduct. The case at bar is a much stronger case for wilfullness on the part of the conductor than was the *Harper case,* for the reason that in *Harper's case,* an explanation was made by the passenger, and the conductor would not heed it. Whereas in the case at bar, the conductor not only would not give the plaintiff the opportunity of making an explanation, but absolutely declined to hear anything at all—did not even call upon the plaintiff for an explanation, but at once characterized and denominated the ticket presented for passage as a bogus ticket. If the conductor had listened to the explanation of the plaintiff, the plaintiff would have satisfied him that he was the original purchaser of this ticket. The cause was properly submitted to the jury, and was properly decided on the facts.

We call the attention of the court to the fact that the defendant obtained instructions from the court (which were clearly wrong) to the effect that if the conductor acted in good faith, and reasonably believing that the plaintiff was riding on a bogus ticket, the jury would find for the defendant. We, of course, cannot complain of this instruction, as a verdict was rendered for the plaintiff, and we referred to it, simply to show that the jury did not believe that the conductor acted in good faith, or that he was reasonable in believing that the plaintiff

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Opinion of the court.

was not the original purchaser of the ticket. The plaintiff was grossly and outrageously treated, and the defendant should congratulate itself that it escaped with so small a verdict. It is submitted that the cause should be affirmed.

Argued orally by *R. H. Thompson,* for appellant, and by *Wm. C. McLean,* for appellee.

CALHOUN, J., delivered the opinion of the court.

This is an action for damages for being forcibly ejected from a railroad train. It is absolutely certain that Mr. Gortikov bought, paid for, and received a round-trip ticket at Tucson, Ariz., good from that place to Chicago, Ill., and return, over the route on which he was ejected. On that ticket and over that route he went without question from Tucson to Chicago, and was on his return; and it is also certain that, pursuant to the directions of his ticket, he identified himself to the agent at Chicago and returned on that same ticket to and south of Memphis, Tenn., and was ejected at Grenada, Miss. The cause of his being put off, according to his testimony, was that the conductor said it was a "bogus ticket," claiming that the plaintiff had purchased it from a scalper, because the original ticket had been issued to a female. Whether the ticket was in fact, or not, when bought, punched in the wrong place, so as to show that it was issued to a female, is in our view wholly immaterial. That was a matter for the convenience of the railroad company, and no passenger should be held to be bound by the mistakes of the agent in using his punch. It will be noted that, in the description of the passenger made by the agent at Tucson, the appellee, plaintiff below, is perfectly described, even to the fact of his having a mustache.

It is also absolutely certain that the ticket, according to the actual contract made at its purchase, had not expired by several days at the time of the expulsion from the train. This is shown by the appellee's testimony, and by the agent who sold him the

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ticket, and on the face of the ticket, as will appear hereinafter, and, if the agent made a mistake in punching the passenger should not be held bound. But, according to the testimony for the plaintiff below, no other point was made by the conductor in the colloquy between him and the appellee except that it was issued to a female, and he refused to listen to any explanation or any proofs of identification from the passenger, and there was evidence that the plaintiff below was prepared to make explanation showing his identity, and would not be listened to, that he had about him evidence which would satisfy any reasonable man that he himself was the original purchaser of the ticket and the identical man for whom it was intended. The conductor did not even call upon Gortikov for any explanation, and would not hear it when it was offered. There was also evidence that he was forcibly put off the train, the conductor and brakeman taking hold of him and making him leave the car, and that at the door the conductor told the marshal of Grenada he wanted him to take the passenger out of the car, and the marshal told him that it was not his business and declined to do so. According to the testimony of the plaintiff there was no talk from the conductor on the subject of an erasure or change in the name until the trial of the cause. However, we have seen the identical ticket, sent to us by consent, and it is perfectly manifest that there never was any erasure. This ticket shows that it was bought October 27, 1904, and that the return limit was punched so as to show December 14, although that very ticket provides, as all such did, that it is good for ninety days from its date, to be not later than December 31, 1904. This is conclusive of the contract, regardless of the mistake which the agent says he made in punching the ticket, and was a matter for explanation, to say the least of it, if the conductor had made the point or been willing to accept explanation. In any case it is the duty of a conductor, when doubt arises as to a ticket, whether a general ticket or a special touring ticket with reduced rates, to listen

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to and accept any reasonable explanation offered, or take the chances. *Railroad Co.* v. *Harper,* 83 Miss., 560, 35 South., 764; *Railroad Co.* v. *Holmes,* 75 Miss., 371, 23 South, 187; *Railroad Co.* v. *Riley,* 68 Miss., 765, 9 South, 443, 13 L. R. A., 38, 24 Am. St. Rep., 309; *Railroad Co.* v. *Drummond,* 73 Miss., 813, 20 South., 7—cited by counsel for appellee. This court is in line with those cases holding that a passenger is not required to see that the selling agent of the ticket made the proper punch marks. The fact that the passenger did not do so does not destroy the validity of the contract. *Railroad Co.* v. *Holmes,* 75 Miss., 371, 23 South, 187.

In the case at bar it was clearly the conductor's duty to accept explanation, regardless of the punch marks. But, as we have said, the evidence on the part of the plaintiff is that the conductor made no such objection to the ticket, but put his refusal explicitly on the ground that the ticket had been issued to a female, and was a "bogus ticket." Looking to all that appears on this ticket, the expulsion was unnecessary, and from the circumstances shown on the part of the plaintiff it is our opinion that they warranted the recovery of both actual and exemplary damages. Examining the whole ticket, it is clear that the contract was not to expire until December 31, and, if the punch mark contradicted this, it should not have been considered by the conductor, because the printed contract should be taken most strongly against the railroad company which issued it.

It is useless to comment on the provision of the ticket, under the head of "Caution," to the effect that, in cases of doubt between the passenger and the conductor, the passenger should pay the rate which the conductor demanded, and get a receipt from him, and report to the general office, and then "the same will receive prompt attention." It is simply advice, and no part of the ten provisions in the ticket. It is a suggestion to the passenger that he could pay the fare, and, if he did it, the general office, on his report, would give it

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Syllabus.

prompt attention, without even specifying that the amount in cash he had paid would be refunded. That this is not a part of the contract is plain. Hutchinson on Carriers, p. 666, § 580, and the authorities there cited, referred to by counsel. Even if a part of the contract, it would be unreasonable and void, as held in the cases cited in the notes to *Cherry* v. *C. & A. R. R. Co.*, 109 Am. St. Rep., 830; *Railroad Co.* v. *Baker*, 7 L. R. A. (n. s.), 103, and *O'Rourke* v. *Citizens' Street Ry. Co.*, 76 Am. St. Rep., 639, referred to by counsel. The circumstances developed by the evidence for the plaintiff below in this case and believed by the jury to make it a willful wrong in the conductor to eject without listening to explanation. *Illinois Cent. R. Co.* v. *Harper*, 83 Miss., 570; 35 South, 764, 64 L. R. A., 283, 102 Am. St. Rep., 469.

Taking the instructions as a whole, we find nothing authorizing this court to reverse.

Affirmed.

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GEORGE RICHBURGER *v.* STATE OF MISSISSIPPI.

[44 South., 772]

1. CRIMINAL LAW AND PROCEDURE. *Embezzlement. Code* 1906, § 1136 *Indictment. Language of statute.*

An indictment of a bank officer for embezzling money belonging to the bank, predicated of Code 1906, § 1136, defining the crime, is sufficient if it charge the offense in the language of the statute.

2. SAME. *Synonymous words.*

In such case, the offense being a statutory one, the indictment need not be drawn in the exact words of the statute, if words synonymous with those employed in the statute to define the crime be used.

3. SAME. *Care or possession.*

Under Code 1906, § 1136, making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession," an indictment charging that the defendant

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had the money under his care is sufficient, as would be one charging that he had the same in his "possession."

4. SAME. *Embezzlement of money. Amount. Value.*

An indictment for embezzling an amount of money need not charge the value of the money; the words "amount" and "value," when applied to money, are synonymous.

5. SAME. *Under defendant's care. From whom received.*

An indictment for the embezzlement of money, charged to have been under defendant's care, is not objectionable for failing to charge from whom he received it.

6. SAME. *Appeal. Supreme court practice. Code* 1906, § 4936. *Questions not raised at trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, if not made a ground of special exception in the trial court, a conviction of a cashier of a bank for embezzlement from the bank will not be reversed because the indictment charged him as cashier, and not as a director, agent, clerk, servant, or officer of a corporation, where the objection is presented for the first time on appeal.

7. SAME. *Case: Indictment.*

The indictment, alleging that defendant on a specified day, being the cashier of a certain bank, a corporation chartered under the laws of Mississippi, did by virtue of his employment as such cashier have under his care of the property of the bank a large sum of money, which had come into his possession and had been intrusted to his care and keeping by virtue of his employment as such cashier, and did afterwards, without the consent of the bank, wilfully, unlawfully, fraudulently, and feloniously embezzle the same, and fraudulently and feloniously convert it to his own use, in the absence of an objection in the trial court that he was charged as a cashier and not as a director, agent, clerk, servant or officer of the bank, sufficiently charged the crime of embezzlement as defined by Code 1906, § 1136.

8. SAME. *Application for continuance.*

An application for a continuance, failing to show that defendant had knowledge that he could prove the matters stated, is insufficient.

9. SAME. *Other evidence. Admissions to prevent continuance.*

The denial of a continuance asked for by a defendant because of the absence of a witness does not constitute reversible error where the state admitted that the witness, if present, would

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testify as claimed and the testimony related largely to matters provable by writings easily accessible, and some of them were actually introduced.

10. SAME. *Amendment of indictment. Code* 1906, § 1509. *Order on minutes. Entry nunc pro tunc.*

An order of court actually made, under Code 1906, § 1509, regulating the subject, authorizing the amendment of an indictment, may be entered on the minutes of the court, from which inadvertently omitted, after the conviction of defendant and upon the hearing of a motion for a new trial or other motion predicated of the omission.

11. SAME. *Code* 1906, § 4936. *Objections not made on trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, unless made a ground of special exception at the trial, an objection that an indictment was amended without entry on the minutes of the order allowing it, as required by Code 1906, § 1509, cannot be heard for the first time on appeal.

12. SAME. *Embezzlement. Indictment. Variance. Name.*

Where a bank from which money was alleged to have been embezzled by defendant was chartered as the "Jonestown Bank of Jonestown," and the indictment designated it as the "Jonestown Bank," the variance was immaterial.

13. SAME. *Bill of particulars. Appeal. Discretion. Review.*

Whether the trial court should grant or deny an application for a bill of particulars being within its discretion, the overruling of accused's objection to a bill of particulars furnished under the court's order, which proved unsatisfactory, will not be reviewed on appeal, unless a gross abuse of discretion be shown.

14. SAME. *Prejudice.*

Where, in a prosecution for embezzlement, the state was required to elect on which items of the charges it would base its demand for a conviction, and it elected two items of the same date, accused was not prejudiced by the court's refusal to require a bill of particulars furnished to be made more certain.

15. SAME. *Election.*

Where the evidence so far failed to establish embezzlement in one of two transactions occurring on the same day, which were elected by the state to support a conviction, that no reasonable person would have believed the conviction was based on it, accused was not prejudiced by the fact that the state was allowed

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to elect two items of the charges, instead of being limited to a single item.

16. SAME. *New trial. Hearing. Code* 1906, § 801.

Under Code 1906, § 801, providing that, when a motion for a new trial shall be granted or refused, either party may reduce to writing the reasons offered for the new trial, etc., and tender same as a bill of exceptions, which shall be signed by the trial judge, on which error may be assigned, the circuit court, on the hearing of a motion by accused for a new trial, is only required to consider the reasons assigned therefor in writing.

17. SAME. *Assignment of grounds.*

A general complaint that the court erred in admitting illegal, incompetent, and irrelevant evidence, or refusing to admit legal, competent and relevant evidence, is insufficient.

18. SAME.

A motion for a new trial for erroneous rulings in the admission or rejection of evidence should designate each of the particular rulings complained of, and make such specific reference to the evidence as will clearly disclose to the trial judge the rulings questioned.

19. SAME. *Reference to bill of exceptions.*

A motion for a new trial, which refers to the evidence as contained in the bill of exceptions, or other writing not filed when the motion was acted on, though filed thereafter, is too indefinite, and presents no question concerning the evidence for review.

20. SAME.

Objections in a motion for a new trial that the court erred in admitting incompetent evidence for the state over objections and exceptions of accused, and in excluding competent evidence offered by accused, are insufficient.

21. SAME. *Construction. Presumption.*

A court is not bound to help out a defective motion for a new trial by construction or supposition.

22. SAME. *Evidence. Admissions against interest.*

Declarations by accused, which are admissions against interest, are admissible.

23. SAME. *Voluntary confessions.*

Declarations by accused, which constituted voluntary confessions, are admissible.

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Statement of the case.

24. SAME. *Embezzlement. Money. Credits.*

The conviction of the cashier of an insolvent bank for embezzling its money will not be vacated as unwarranted where, his accounts being largely overdrawn and knowing it could not make him an unsecured loan, he, while absent from the bank, issued his check on it for five hundred dollars, and, being in the bank when several checks, including it, were presented for payment by a collector, executed to the collector the bank's check for the aggregate sum of all of them, drawn upon a trust company in which the bank had a deposit and which was paid in money upon presentation.

25. SAME. *Defenses. Deposits.*

Where the cashier of a bank in failing circumstances misappropriated five hundred dollars of its funds, his account being largely overdrawn, it was no defense to a prosecution for embezzlement that he deposited to his general account after such misappropriation five hundred and four dollars, since, under the rule of appropriation of payments, such deposit was properly applied to the former overdraft.

26. SAME. *Venue. Offense committed partly in two states. Code* 1906, §§ 1404, 1405.

Where the cashier of a bank misappropriated its funds on deposit in a bank in another state by means of checks, one drawn in this state and one in the other, he may be indicted for embezzlement in this state, under Code 1906, §§ 1404, 1405, providing that where an offense is begun out of this state and consummated in it or is begun within the state and consummated out of it the prosecution may be had in this state where begun or consummated.

27. SAME. *Misconduct of counsel. Argument.*

The trial court should not hesitate of its own motion to prevent counsel for the state from abusing his right to argue the cause to the jury.

28. SAME. *Appeal. Objection not made at trial.*

Misconduct of counsel cannot be reviewed, where accused made no objection thereto at the time, nor until after verdict.

FROM the circuit court of, second district, Coahoma county. HON. SAMUEL C. COOK, Judge.

The appellant, Richburger, was indicted, tried and convicted of embezzlement, sentenced to the penitentiary for two

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Brief for appellant.

years, and appealed to the Supreme Court. The facts are fully stated in the opinion of the Court.

J. W. Cutrer, Alexander & Alexander, and *George B. Power,* for appellant.

It might have been competent for the state to have indicted and tried appellant for the embezzlement of a general balance due on his account, and this is what the state by indictment charged, and by its evidence sought to prove. The effect of the course taken by the state was that the entire history of the Jonestown Bank of Jonestown was going into, and a trial had, as though the issue were one between the bank and its depositors. The trial ceased to be one of defendant for embezzlement, and became a trial of the bank as to its dealings with the public and its customers.

There was a demurrer to the indictment, which was overruled, and this action of the lower court is assigned for error. We will not discuss this at length. The indictment did not state that appellant had in his *possession* the money of the bank in the said county and district. It alleged that he had under his care the said sum, which had come into his possession and had been entrusted to his care by virtue of his employment as cashier; but one can have under his care property in a different county from his residence, or in a different state. Money cannot be embezzled except by its being actually taken and appropriated. Embezzlement must occur where the money is. The force of this objection becomes apparent when we look to the proof, which shows that in fact the sum of $522.72, which was paid on the checks of Richburger, was not paid in this state but in Memphis, Tennessee. The indictment is for embezzling money alone, not checks, nor drafts, nor evidences of debt, but actual money. The money paid out on the checks for $522.72 was, when the checks were paid, not in Mississippi, but in Memphis, and the only reduction made in the assets of the bank

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thereby was to reduce, by that amount, its deposit in a Memphis bank.

The indictment was fatally defective for another reason. It was framed on our statute, which does not use the word "cashier." The persons mentioned in the statute, Code 1892, § 1058, are "director, agent, clerk, servant, or officer of any incorporated company." Appellant is not brought within any of these classes unless the court can assume, as a matter of law, that a cashier is within some one of these designations. The indictment does not so state. It was necessary therefore that the indictment should either allege that defendant was an agent, clerk, servant, or officer of the bank, or that he was cashier thereof, and that as such cashier he was an agent, clerk, servant or officer. The indictment being on a statute must conform strictly thereto. The demurrer to the indictment should have been sustained.

One of the first errors we notice, and which is a fatal one, is, that defendant was tried on an amended indictment which had not been amended as expressly provided by law. In *Shurley* v. *State,* 43 South., 299, decided April 1, 1907, this court held that Code 1906, § 1509, is mandatory, and that the amendment must be made by an order on the minutes specifying precisely the amendment made. It is a vicious and dangerous practice, and one subversive of the fundamental rights of the accused, to allow the district attorney to amend an indictment by erasing words and clauses, and by interlineations. The indictment in this case alleged embezzlement of money, the property of the Jonestown Bank. The state itself produced and introduced the character of the bank which showed that its corporate name was "The Jonestown Bank of Jonestown." The words, "of Jonestown," were as much of the corporate name as the first word "Jonestown," or the word "bank." It was the only rightful name that the bank had. When the state discovered this variance, it asked leave to amend, and this was allowed over the objection of appellant. Even when the amendment was made, the

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Brief for appellant.

erroneous name was not stricken out and the true name inserted, but the indictment was altered by the district attorney so as to read "The Jonestown Bank, alias The Jonestown Bank of Jonestown." An alias is proper only where a person is known generally by two names and the grand jury does not know which is the true name, and in such case the indictment should aver that the true name is unknown to the grand jurors, but none of these facts or conditions are shown. It is simply a case where on the trial the state by its own proof developed a variance, and, to cure it, the district attorney, instead of having the court proceed in the manner expressly mapped out and required by Code 1906, sec. 1509, himself assumed to make the amendment by erasures and interlineations. Unless *Shurley* v. *State* is to be ignored, the judgment in this case must be reversed for this obvious error.

It must be noted that there was no effort on the part of the state to avoid the necessity for an amendment by introducing any evidence to show that the bank was usually known by the name of "The Jonestown Bank." In the absence of such showing an amendment giving an alias designation would be improper in any event; but, if it were necessary and proper, the amendment cannot be made except in the manner pointed out by the code.

On the motion of appellant, the court ordered the state to furnish a bill of particulars. As the offense had been charged in a general way, it was the right of the appellant to have such a bill of particulars furnished. 15 Cyc., 513. To secure such a bill of particulars Richburger filed a sworn application, setting out the necessity for it and in what respect he would be prejudiced if it were not furnished. The court held his showing sufficient and sustained his application. And, thereupon, the state filed what purported to be a bill of particulars, but what, on the contrary, was a bill of generalities. A bill of particulars is allowed by law, and was ordered by the court in this case to make specific the charge and narrow the inquiry,

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to direct appellant's notice to the particular transactions relied on for a conviction, to enable him to prepare his defense as against the specific case to be made by the evidence in respect to the particular transactions constituting the crime. If the bill of particulars, instead of narrowing and making more specific the inquiry, goes far beyond the indictment itself and contains new and distinct charges and sets out incompetent and irrelevant matter prejudicial to defendant, then the bill of particulars becomes a mockery of justice. The requirement that the state furnish a bill of particulars was in the nature of a requirement that the state elect what it would stand on and give appellant notice thereof. The indictment was known to the parties to charge the embezzlement of a general balance of account, although not so framed as to show this. If it be insisted that it was competent for the state to stand on the indictment as drawn, and under the order for a bill of particulars give notice that the indictment and prosecution would be treated as if it were the embezzlement of the amount shown by the aggregate overdraft of defendant, the answer is that this was not done. On the other hand, the trial was not finally had for the embezzlement of a general balance, but for two specific items making up the sum of $522.72. The bill of particulars added insult to injury. The appellant, following his strict legal right, moved the court that the state be required to file a bill of particulars giving defendant information "as to the time and place when he, the said defendant, is alleged or charged to have received from the said Jonestown Bank the money stated in the indictment to have been by him so received, and the person from whom he, the said defendant, so received the said sum of money so alleged to have been embezzled." Instead of narrowing the inquiry down to some one item, the bill of particulars enlarged the charge in many ways; instead of giving notice of the time and place and the amount on which the state would elect to stand, and to meet which the appellant would be called on to produce evidence, the bill of particulars, which, when

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filed, became part of the charge against defendant, alleged that the state would prove on the trial that in 1903, three years before the act of embezzlement in question, appellant was indebted to the bank in the sum of $5,000, for which he gave an insolvent note, and that thereafter he began to appropriate funds of the bank by checking them out from time to time until January, 1906, the defendant took at divers and sundry times various sums of money belonging to the bank and squandered it in gambling, the funds amounting to in the aggregate $8,655.59. The facts which appellant wished to have disclosed by the bill of particulars, the state refused to give, viz., the dates and amounts of the alleged embezzlement. The bill of particulars went further and stated that it was shown that appellant embezzled more than the entire capital of the bank and gambled it off, and fled, and returned, and confessed to various persons that he had embezzled the funds of the bank, and "wrecked and robbed the bank and was sorry that he did so and asked to be forgiven for it." And, as if the wrong and injustice to appellant was not enough, the bill of particulars went on to allege that the state would show that defendant, knowing that the bank was insolvent, induced people to put their money in it in order that he might embezzle the same, thus alleging a distinct and independent crime, viz., that of receiving deposits while the bank was insolvent.

This so called bill of particulars having been over appellant's objection filed, the district attorney proceeded to give evidence for the state through as wide a range as, and even wider than, that indicated in the bill of particulars.

When the bill of particulars, containing these new and distinct charges, was allowed to be filed, appellant asked for a continuance in order that he might meet the case which the state now for the first time indicated that he would have to meet. His application, supported by affidavit for continuance, was overruled, and this is assigned for error. Surely, if the court, by allowing the bill of particulars to be filed, opened up

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to the state another field of inquiry shown in the bill of particulars, it was proper to give the appellant time to prepare for it. The books of the bank were never kept by Richburger but by others who were bookkeepers. The state expected to rely and did rely mainly on the books of the bank for its evidence. It was therefore exceedingly important and vital to defendant that he be given a continuance or postponement in order that he might have an opportunity to prepare to meet the case made by the bill of particulars. He had not at any time during the year 1906 had access to any of the books, papers or records of the bank. They were in the possession of receiver Nachman who was a resident citizen of the second district of Coahoma county, but was temporarily out of the state, and who had come into possession of and knew all about the state of appellant's account with the bank and the securities which he had given for the amounts obtained by him from the bank from time to time. The application for continuance averred that the receiver would return before the next term of court, and would be in attendance. There was no effor to controvert the statements of this sworn application, but the court overruled the same and forced appellant to trial.

In order to illustrate and make plain the injustice of the procedure, especially in the matter of incompetent and prejudicial evidence introduced over appellant's objection, we will proceed briefly to notice the course of the trial. The state began by introducing the charter granted in 1898, and then introduced the stock book showing the amount and distribution among the stockholders of all the stock of the bank that was paid in. These shares of stock were issued as early as 1899. There is not a particle of evidence that there was anything wrong about the issuance of the stock, or fixing the amount of the stock, or how it was to be paid for. The stock was issued several years before the first items appear in the account between Richburger and the bank, and it will be seen that the state began on June 30, 1903, to take up and investigate the

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account between defendant and the bank, showing the same solely by the books themselves. Who owned the stock of the bank and how it was paid for, and when, were wholly immaterial, but it was exceedingly prejudicial to go into the question of the ownership and distribution of the stock, since it showed what persons in the county and district lost money by the bank. An illustration of this illegal evidence and the wide range it took and how prejudicial it must have been is shown, in that the state was allowed over appellant's objection to show how the bank was organized, and its stock subscribed for, and when it was paid, and by whom; these transactions going back to the beginning of 1899.

We most earnestly press upon the attention of the court the fatal error of allowing evidence to take such a wide range. It must not be forgotten that the circumstances were such as to inflame the public against appellant. Every stockholder, every depositor, who loses money by a bank which fails, becomes at once active in the pursuit of the official supposed to be responsible, and becomes a nucleus of influence and effort making for his conviction. The injustice of the course taken in the trial cannot be made more apparent than by a general view of the range and scope given to the evidence. It was wholly immaterial who were the stockholders, and which stockholder had paid up his subscription and which had not; but, it was a most potential fact before a jury to let the jury know who of the citizens of the county had suffered a loss.

Witness after witness testified over appellant's objection as to how much he had in the bank and how much he lost. All this had no possible connection with the question whether appellant embezzled the particular item charged, on December 8, 1905. There was not even an effort to show when the deposits were made by these several witnesses, nor the circumstances, nor whether they relied to any extent on Richburger. In the next place, the court allowed the state to introduce to the jury the entire pleadings and court papers in a chancery suit, brought by

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creditors of the bank for the purpose of obtaining a receiver. The bill in that case which was not sworn to by any complainant, contained many serious charges against the appellant which could not be evidence in this case, and also set out certain dispositions made by him of his property which the creditors were seeking to reach and subject.

It was therefore manifest error to allow the chancery record to be introduced and read to the jury. There is nothing to show that it was not read.

The court allowed the state to prove over appellant's objection by Hyman and by Longino, two witnesses for the state, many so-called confessions made by Richburger after the bank had closed its doors. No one of these was a confession of the crime charged, and such action constituted reversible error.

There was a variance between the indictment's allegations and the evidence in that the indictment charged that appellant embezzled money, whereas the evidence offered by the state showed an embezzlement, if any at all, not of money but of checks.

However wrong Richburger may have acted in the management of the bank, it must not be forgotten that he is now being tried for embezzling only two sums of money. If all the mass of prejudicial testimony which had been introduced before the election is permitted to remain and make up the state's case, then the filing of a bill of particulars and the election of two items were indeed a farce.

It was error to refuse appellant's demand that the state elect as between the $500 and the $22.72 check. If there was any necessity or propriety in electing at all, the election ought to go so far as to stand on a single item and not on two. *Malcolmson* v. *State,* 25 Tex. App., 267. It is not shown that there was any connection whatever between the transactions. The checks were drawn at different times and for different purposes. Would an indictment in setting out in the same count these two distinct acts of embezzlement be tolerated? If not,

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Brief for appellant.

how can they be joined on the trial, especially under an indictment and under a bill of particulars, neither of which mentions these checks?

The court should have directed a verdict of acquittal because some of the essential elements of embezzlement were wanting in the case made. No felonious intent had been shown. In order to show felonious intent, it is essential that there should be some kind or degree of concealment or acts of the servant misleading the master. 1 Whar. Crim. Law, sec. 1030; *State* v. *Tompkins,* 32 La. Ann., 620; *Calkins* v. *State,* 98 Am. Dec., 132; *Fleener* v. *State,* 58 Ark., 98.

There was not the slightest evidence in this case of any secrecy or effort to conceal on the part of Richburger. Every transaction relied on by the state openly and correctly appeared on the books of the bank. These books were subject to the inspection of the president, board of directors, and stockholders. There is no proof that any one of them was misled.

In the next place, the verdict of acquittal should have been National Bank of Helena, and is not shown ever to have been received and appropriated by appellant within the jurisdiction of the court. Bear in mind that the state elected to stand on the two checks drawn by Richburger on December 8, 1905; one of these was $12.72, which in some way was entered up as $22.72. However this error may have occurred, the fact is that this check was never marked paid; no cash was received on it by Richburger. It was passed to the credit of the First National Bank of Helena, and is not shown to ever have been drawn out. Indeed, it is not denied that no money was ever paid out to any one on this $22.72 check. The other check was $500, drawn in favor of the Conaulk Millinery Company by Richburger, on or about December 5. It was sent to the millinery company and deposited with a Memphis bank, and by it endorsed to another bank and sent with other collections on the Jonestown Bank through the American Express Company. It was not paid to the express company, but the draft on Memphis

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Brief for appellee.

was given by the Jonestown bank to the express company covering all the collections, and this draft was forwarded through the American Express Company, and paid in Memphis. The effect was merely to reduce the amount the Jonestown bank had on deposit in Memphis. We submit that it was necessary to show that appellant received and appropriated money belonging to the bank within the jurisdiction of the court.

Some act of appropriation must be alleged and proved to have taken place within the jurisdiction of the court. *Larkin* v. *People,* 61 Barber, 226; *State* v. *Bancroft,* 22 Kansas, 170; *Carr* v. *State,* 104 Ala., 43.

The state attempts to justify the wide range taken by evidence solely as tending to show intent. The effort was to apply the rule which has found pretty general recognition that other and closely related acts of embezzlement may be shown to illustrate the intent. We do not deny this general rule, but it has no application to this case. Evidence of other acts can have no further legitimate effect than to show guilty intent, and, where competent for that purpose, the court must inform the jury that it is so limited, and confine the evidence within its proper scope. A failure to do so will cause a new trial. *Commonwealth* v. *Sheppard,* 1 Allen, 575; *Hoyt* v. *State,* 50 Ga., 313; *Cribbs* v. *People,* 82 Ill., 425.

The judgment of the court below should be reversed because of improper argument before the jury by one of the prosecuting attorneys in the court below.

There was also reversible error in the lower court's granting the instructions for the state shown to have been granted in the record; and also error in refusing and modifying those asked by appellant and so noted in the record.

R. V. Fletcher, attorney-general, for appellee.

It is insisted by counsel for appellant that the indictment in this case is drawn under Code 1892, § 1058, and that this section does not make a "cashier" liable to punishment for em-

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Brief for appellee.

bezzlement; that the statute limits the crime to "directors, agents, clerks, servants, and officers"; and hence the indictment is fatally defective because the cashier is not described as belonging to some one of this designated class. The indictment does charge that, as such cashier, appellant had under his care the money of the bank, that such money was in his possession, and was entrusted to his care. This point is raised for the first time in this court, this objection not being specifically stated as ground for demurrer in the court below. It is submitted that unless the omission is such as to render the indictment void as charging no offense, the court cannot consider the matter because of the failure of the defendant to make it ground of demurrer. This ground of objection could not be considered by the trial court because of Code 1892, § 696, expressly providing that the court shall regard only such defects and imperfections as are assigned for causes of demurrer; and this court can not now for the first time consider it because of Code 1892, § 4370, prohibiting this court from reversing a case unless the error complained of was made ground of special exception in the court below. Of course, jurisdictional errors are excepted from the rule. But, if mistaken in this, the state contends that the designation of defendant as "cashier," taken with the recitals of his duty in the indictment, sufficiently describes him as an officer or agent of the corporation, since he is shown thereby to have the care, custody and control of the money of the bank, by virtue of his employment as cashier.

There need be no direct averment in express words that the defendant was a bailee, trustee or agent where facts are set forth showing that he was such. 7 A. & E. Pl. & Pr., 418.

The term "cashier," as applied to a bank, has a fixed, certain and well understood legal meaning, and has been defined as the executive officer of a bank by whom its debts are received and paid and its securities taken and transferred, and as one who conducts the whole financial operations of the bank. *Mer-*

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Brief for appellee.

chants Nat. Bank v. *State Nat. Bank,* 10 Wall. (U. S.), 650.

The use of this word "cashier" in the indictment is, therefore, equivalent to a charge that the person so described is an officer of the bank. An information for embezzlement, which fully states the facts constituting the crime, is good though it does not designate the accused as "bailee," "trustee" or "agent," nor formally put him in any of the classes named in the statute defining embezzlement. *People* v. *Johnson,* 71 Cal., 384; *People* v. *Neyce,* 86 Cal., 393; *State* v. *Washington,* 6 South., 633.

It is not always necessary to follow the precise language employed in a statute, if words of equivalent meaning are employed. *Harrington* v. *State,* 54 Miss., 490.

In *Roberts* v. *State,* 55 Miss., 421, the court held that an indictment was not bad because the building burglarized was described as a "corn crib" when the statute mentioned only "shop, store, booth, tent, warehouse, or other building, etc.," saying that it is sufficient if the words of the indictment are synonymous with those of the statute.

It is insisted by appellant that the indictment is bad because the Jonestown bank is described as a "corporation" while the statute uses the expression "incorporated company." This is far too refined. No real or substantial distinction exists between a "corporation" and an "incorporated company." It is manifest that the terms are used as synonymous and interchangeable, and the use of the one expression is equivalent to the other. *Roberts* v. *State, supra.*

The indictment is assailed also because in one place it asserts that defendant had under his care certain property of the bank, and in another place it asserts that the money had come into the possession of defendant, and had been intrusted to his care and keeping, etc., and some fanciful distinction is sought to be drawn between "care," "possession," "custody," etc. But the conclusive reply to this criticism is the statute itself, which provides "which shall have come or been entrusted to his care or possession by virtue of his office, etc." Counsel are not accurate

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in their statement that the offense would be larceny if the property were in his "custody," and embezzlement if in their "possession." Always it is embezzlement if there is no trespass, and it would be difficult to conceive of trespass in connection with property placed under another's custody. Indeed, the distinction between "care," "custody," and "possession" is over technical and not practical. The indictment does charge that Richburger was the cashier of the bank, and that by virtue of such position he came into the possession of the certain monies there set out, and that such monies were in his keeping and under his care. Surely, this is sufficient.

But it is argued that the indictment does not allege that the money came into appellant's possession or was embezzled in the county or district where the prosecution was had. But how can this be seriously argued when the caption recites the district and county? The first line of the description of the substantive crime recites "in said district of said county," and before each allegation in the indictment occurs the phrase "then and there," always pointing back to the original allegation of place. Whether the proof showed a crime committed within the jurisdiction of the court is another question to be considered by the court later in the trial, but it is evident from an inspection of the indictment that every element of the offense is plainly charged as taking place in the second judicial district of Coahoma county.

But it is contended by appellant that there is no allegation in the indictment of an intent to defraud or deprive anyone of his or its property. This indictment alleges that the appellant did "fraudulently embezzle." This expression tells the whole story, and includes the idea of intent to defraud, and the intent to deprive of property. Certainly, in an indictment for larceny it is not necessary to allege in addition to an allegation of the felonious stealing that it was with fraudulent intent to deprive of property. All these elements are embraced in the

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term "steal," and so likewise they are embraced in the term "embezzle."

The statute under which this indictment is found does not say anything as to intent, and this being true, the point is perfectly covered by this rule: The indictment must with certainty and precision charge the defendant with acts of commission or omission, under the circumstances, and with the intention mentioned in the statute; but where the statute does not in specific words make criminal intent an element of the offense, further than is necessarily included in the words "embezzle, convert to his own use, or make way with any secret," fraudulent intent need not be charged in so many words. 7 A. & E. Ency. Pl. & Pr., 441, and authorities there cited, especially the Nevada and Kansas cases mentioned in the note.

But it is claimed that the property is not specifically described, and it is said that the larceny rule must prevail. The property embezzled is described as money, and this is sufficient under Code of 1892, § 1364.

Appellant's application for continuance was grounded upon the absence of one Nachman, formerly receiver of the insolvent bank; one Lea, who testified in the case, being his successor. Nachman had never been served with process, it being shown that he had not been within the jurisdiction of the court since the indictment was returned. It is not shown where Nachman was at the time of the trial, but it was stated that he was absent temporarily and would be back before the next term of court. The court overruled the application, but required the state to admit that the witness, if present, would swear to the facts set out in the affidavit. A close examination of the affidavit filed with the application will show that Nachman was desired, not in order to prove any specific facts, but that defendant might ascertain whether he, Nachman, *knew* any facts. It is not pretended that Nachman had any papers not at the time of the trial in possession of the receiver. It is

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stated in the application that some undesignated papers were turned over to Nachman which are not now in the hands of the receiver, but it is not pretended that the papers set out in the affidavit and application were in the form of notes or promises to pay. They were simply "accounts, claims and demands." When the court required the state to admit that these claims were turned over, or that Nachman would testify that they were, appellant received the benefit of everything which Nachman could say. This is not a case where the personal presence of the witness would add strength to defendant's cause. Were he an eye witness to a material fact, his presence and bearing might turn the tide. But if present, he could only identify some accounts, and their admission as true would answer the same purpose. It is charged that Nachman received transfers of real estate from Richburger, but surely the deed records of the county would show these transfers, and certainly some other citizen could be found who could speak intelligently as to their value. The application does not state clearly and unequivocally that the papers about which Nachman was expected to testify were not turned over to Lea, his successor. It is stated that the papers so turned over had been examined, but with what result, deponent sayeth not. This court will not require the trial court to delay a trial in order to give defendant an opportunity to hunt for evidence not known to exist, as was expressly held in *Hemingway* v. *State,* 68 Miss., 371. Furthermore, many, if not all, of the credits, accounts, etc., alleged to have been turned over to Nachman, as receiver, were gone into on the trial. Many of them were shown to be worthless, and the others, at a fair valuation, entirely insufficient to balance the deficit.

As concerns the bill of particulars, if the court had refused to require the state to file any bill of particulars at all, such action could not be assigned for error. For the granting of such a bill, not being mentioned in the statute nor fixed by decision as part of our practice, rests entirely within the discre-

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tion of the trial court and is not generally open to revision by a higher tribunal. 1 Bishop's Cr. Pr., 381. It would necessarily follow that the trial court would exercise an unreviewable discretion as to the sufficiency of a bill of particulars when filed. Besides, the bill filed was as specific as could have been made. It gave the dates of the inception of the embezzlement, recited a constant course of increasing overdrafts, stated when such overdrafts were closed by a worthless note, recited a new series of overdrafts, culminating in the exhaustion of the bank's funds on a day named. It could hardly be demanded that each separate check or overdraft should be named. That the alleged insufficiency of the bill of particulars could have had no harmful effect is shown by the course the trial took. Ultimately, the state elected to stand on two items, aggregating $522, both paid on the same day, and of such a nature that the defendant had every opportunity to explain them. The agent of the express company, who collected the $500 check, was present in court and explained the whole transaction. The books spoke for themselves as to the condition of the cashier's personal account. The sole issue finally submitted to the jury comprised essentially these two elements, viz.: the overdrawn state of Richburger's account at the time, and the fact of his paying these two checks. Upon both facts there could be no question of surprise, and had no bill of particulars been furnished, defendant would not have been prejudiced.

As regards the amendment of the indictment, it appears that the bank defrauded was referred to in the indictment as the "Jonestown Bank." But when the charter was introduced in evidence, it appeared that the true corporate name was "The Jonestown Bank of Jonestown." Objection being made to the introduction of the charter, the district attorney applied to the court for leave to amend the indictment and, by leave of the court, the indictment was accordingly amended by inserting after the name "Jonestown Bank" wherever it occurred in the indictment the words "alias Jonestown Bank of Jonestown."

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It is insisted that it nowhere appears that this amendment was made by entry on the minutes, and that the case falls within the rule laid down in *Shurley's case, Ante* 415, 43 South., 299, decided April 1, 1907. But in *Shurley's case* the district attorney amended the indictment without leave of the court, and without application to the court. In the instant case the indictment was unquestionably amendable under Code 1892, § 1435, and the district attorney properly applied to the court for leave to amend, which was granted, and the indictment was amended accordingly. The only real complaint is that there is no transcript in the record showing the minute entry. Now, the order was made by the court, as is shown by the stenographer's notes. The record does not show that the amendment was entered on the minutes, but this was not made ground of special exception in the court below. Objection and exception were taken to the action of the court in allowing the amendment, but nothing was said as to the order not being entered on the minutes. The alleged error can, therefore, not be considered. Code 1892, § 4370. *Ex parte Neil,* recently decided by this court. But if mistaken in this, it is a conclusive answer to the objection to say that no amendment was necessary. Certainly, it was not necessary to amend unless a variance was presented. It was shown that the bank was located at Jonestown, and transacted all its business under the name of the "Jonestown Bank." The variation in the name by omitting the words "of Jonestown" was immaterial. 10 Ency. Pl. & Pr., 510, and authorities there cited; *Putnam* v. *U. S.,* 162 U. S., 687 (40 L. Ed., 1118); *Rogers* v. *State,* 90 Ga., 463.

If it is argued that the court should have confined the proof to the single items upon which the state finally elected to stand, and not have permitted proof of other overdrafts, the answer is that nothing is better settled in the law of embezzlement than that other acts of embezzlement may be shown, all being a part of the same system, for the purpose of showing

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the intent with which the act was done. See 1 Wigmore on Evidence, 329 and 304.

It was competent to show that the money of the bank had been made away with, and this by the testimony of depositors. *Reeves* v. *State,* 11 South. (Ala.), 158.

It is insisted by appellant's counsel that the court below ought not to have admitted the statements made to others by Richburger before the trial, as to the condition of the bank and his connection therewith. But these statements were clearly admissions against interest, tending to show the condition of the bank and the connection of defendant therewith, and his responsibility therefor. In these statements, he admits responsibility, confesses his wrongdoing and begs for toleration and forgiveness. It is immaterial whether these statements be classed as "confessions" or not. They were admissions of guilt and, as such, competent.

It is contended by opposing counsel that the state should not have been permitted to select two items and ask for conviction on both, but should have been limited to one only. Now, it is by no means clear that the state was compelled to elect at all. It could have stood for a conviction for the whole sum embezzled, and if so, why could not two items, both occurring on the same day, be selected? "An embezzlement may consist of a continuous series of acts." 10 A. & E. Ency. Law (2d ed.), 995.

But it is contended by opposing counsel that the indictment charged an embezzlement of money, whereas the proof shows an embezzlement of checks. This will not do. The stockholders and depositors paid actual money into the bank, and this money was embezzled. The money, or its equivalent, was sent to Memphis, Tennessee, for convenience in remitting, and held by the Jonestown Bank's Memphis correspondent. It was still the money of the bank whether on deposit in Jonestown or Memphis. The actual money was paid out in Memphis or Helena, just as much as if paid over the counter at Jonestown.

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Code 1892, § 1330, provides that: "When an embezzlement is committed, it may be prosecuted in the county in which the money or property, or some part thereof, was received or converted by the accused, or in the county in which he was under obligation to pay over the funds or to deliver the property." That the money was paid in another state beyond, as is said, "the jurisdiction of the court," makes no difference.

There was no error in the granting, modifying and refusing of the many instructions in this case.

This record, voluminous as it is, may possibly present some minor irregularities in the admission and exclusion of testimony, but none of these constitutes reversible error. The case extended over more than a week. It is conclusively shown that Richburger overdrew his account $14,000; that he wrecked the bank; that the pretended securities which he turned over to cover his shortage were practically worthless, and that he confessed his guilt over and over again. It would be a glaring error indeed which would warrant the court in reversing the judgment in a case where the defendant's guilt is so overwhelming on its facts. No defense is attempted—no effort made to show that defendant is not guilty. He stands in the court upon the technical insufficiency of the state's case, and he pleads in extenuation of his conduct nothing except some alleged minor errors in the court's rulings. Under these circumstances he is not entitled to any technicalities except such as may safely be said to have resulted in his prejudice.

Argued orally by *Jno. W. Cutrer* and *C. H. Alexander,* for appellant, and by *R. V. Fletcher,* attorney-general, for appellee.

THOMPSON,* Special Judge, delivered the opinion of the court.

The appellant, George Richburger, was indicted, tried, and

* WHITFIELD, chief justice, was ill and unable to preside in this cause, whereupon R. H. THOMPSON, ESQ., a member of the supreme court bar, was commissioned by the governor as special judge to preside in his place.

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convicted of embezzlement, sentenced to the penitentiary for two years, and appealed to this court. The indictment against him is predicated of Ann. Code 1892, § 1058 (Code 1906, § 1136), and the specific charge was "that he, in the first district of Coahoma county, on the 23d of April, 1906, then and there being the cashier of the Jonestown Bank, a corporation chartered under the laws of the state of Mississippi, did then and there, by virtue of his employment as such cashier, have under his care, of the property of the Jonestown Bank, $8,659.59 in money, which had come into his possession and had been intrusted to his care and keeping by virtue of his said employment as such cashier, and did afterwards then and there, without the consent of said Jonestown Bank, willfully, unlawfully, fraudulently, and feloniously embezzle the same and fraudulently and feloniously converted the same to his own use."

The indictment charged a statutory offense, and the language of the statute of which it is predicated is sufficiently specific to give notice of the acts made unlawful and sufficiently exclusive to prevent its application to other acts. The case, therefore, belongs to that class in which it is sufficient to charge the offense by using only the words of the statute (*Jesse* v. *State,* 28 Miss., 100; *Sullivan* v. *State,* 67 Miss., 346, 7 South., 275); and the sufficiency of the indictment must be determined in the light of the well-established rule which justifies, in charging statutory offenses, the use of words synonymous with those used in the statute defining the crime. *Harrington* v. *State,* 54 Miss., 490; *Roberts* v. *State,* 55 Miss., 421. The indictment under consideration, in so far as its validity was brought in question in the trial court, conforms to the statute in every material particular, using its exact or synonymous words, and the court below did not err in overruling the demurrer to it. The cause of demurrer which sought to draw a distinction between a charge of having money in one's care and having it in one's possession is answered by the statute itself

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(Ann. Code 1892, § 1058; Code 1906, § 1136), making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession." A charge, as distinctly made in this case, that defendant had the money under his care, is sufficient, as would be a charge that he had the same in his possession.

It is unnecessary under our statutes (Ann. Code 1892, § 1364; Code 1906, § 1436), the charge being that defendant embezzled a designated sum of money, for the indictment to aver the value of the money. The charge that the defendant had embezzled $8,659.59 by its very terms fixes the amount of money charged to have been embezzled; and the words, "amount" and "value," when applied to money, are synonymous. *State* v. *Kruttschnitt,* 4 Nev., 212; *Bartley v. State,* 53 Neb., 362, 73 N. W., 744; *State* v. *Knox,* 17 Neb., 683, 24 N. W., 382; *Gady* v. *State,* 83 Ala., 51, 3 South., 429; *State* v. *Barr,* 61 N. J. Law, 131, 38 Atl., 817; *Grant* v. *State,* 55 Ala., 201; *Duvall* v. *State,* 63 Ala., 12. In *State* v. *Stinson,* 24 N. J. Law, 9, decided in 1853, the following rules were laid down by the highest appellate court of that state touching indictments for embezzlement; the case before the court being an indictment, as here, against the cashier of a bank for embezzling its funds: (1) Where the larceny, embezzlement, or criminal conversion of any article, whether coin or security or chattel, is charged, the article should be described with reasonable certainty. (2) The value of the article should be stated, unless it be a coin of the government, in which case, the value being established by law, the courts will take notice of the value. (3) The term "dollars" is an expression of value, as well as the name of a coin, and hence the word "dollars" is uncertain as a description, since it may be used to denote a number of cents or dimes, as well as dollars proper, but is certain as an expression of value. These rules have been changed to some extent in this state, so far as concerns the larceny or embezzlement of money, by Ann. Code 1892, § 1364 (Code 1906, § 1436), making it sufficient to

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describe the property in general terms as money, but are ample authority for the conclusion that the indictment in this case is not defective for failure to aver the value of the money. The case of *Merrill* v. *State,* 45 Miss., 651, is not at variance with our conclusion.

The other causes of demurrer assigned are sufficiently answered by what has already been said, and we need not make special reference to them, further than to say that it is unnecessary for the indictment to charge from whom the money under defendant's care, and which he is charged to have afterwards embezzled, was received. The statute does not so require.

An objection to the indictment, most strenuously argued in this court, is predicated of the fact that it fails to show that the appellant, in the language of the statute, was a director, agent, clerk, servant, or officer of any incorporated company, the charge being that he was the cashier of the bank; but we are precluded, the objection not being jurisdictional in its nature, from deciding the point, not made in the court below, but presented for the first time in this court, by Ann. Code 1892, § 4370 (Code 1906, § 4936), providing that a judgment in a criminal case shall not be reversed because of any error or omission in the case in the court below, except where the error or omission is jurisdictional in character, if it were not made ground of special exception in that court.

When the cause came on for trial in the court below, the defendant asked for a continuance because of the absence of one Nachman, who was without the state and had not been subpœnaed. He had been appointed by the chancery court receiver of the Jonestown Bank, whose money was charged to have been embezzled, but had resigned the receivership and surrendered to his successor the records, papers, and documents belonging to the bank which had come to his hands. The court below disallowed the application for a continuance, but required the state to admit that Nachman would testify as appellant claimed he would do, were he present. This was quite

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as much as defendant had a right to demand. The affidavit upon which the continuance was asked was insufficient. It was in its nature largely an application for delay, to give defendant opportunity to make search for evidence not known to exist, and as such it deserved to be denied. *Hemingway* v. *State,* 68 Miss., 371, 8 South., 317. Nachman's presence seems to have been desired quite as much to ascertain if he knew anything as to prove any specific fact by him. It was not claimed that he had in his custody any paper or record which ever belonged to the bank, or which would throw any light whatever on the issue to be tried. The utmost showing on this point amounts to a statement that there came to his hands as receiver some papers and records—just what they were is not shown—which were not at the time of the trial in the hands of his successor. The statement in the affidavit that "defendant states further that he expects to prove by said witness that prior to the appointment of said receiver he had conveyed to said bank, or caused to be conveyed thereto, for his account, a large amount of valuable real estate and security for any indebtedness which he might owe to said bank last aforesaid—in fact, all that he possessed or owned—and that the said Nachman informed himself of the value thereof, and possessed himself thereof, for and on behalf of the said bank, and that the defendant has never received from said bank any credit therefor, or for any part thereof," does not aid the application. Assuming that the defendant made the conveyances stated, there is nothing to show but that the deeds and papers, the best evidence, were accessible, and none that the value of the land, presumably located in the county, could not be testified to by other persons whose presence could be obtained. It is to be noted that many of the securities enumerated in the affidavit were really produced on the trial; and in addition it is undoubtedly true, as said by this court in *Starling* v. *State, Ante,* 255, 43 South., 952, that, standing at the close of a completed record and looking back on a finished trial, it is manifest that re-

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versible error was not committed by the circuit court in overruling the application for a continuance.

The trial of appellant had proceeded but a short time when the state offered to read in evidence the charter of the bank, to which the defendant objected on the ground that the injured party was named "Jonestown Bank" in the indictment, and the charter offered to be read was that of the "Jonestown Bank of Jonestown." Thereupon the district attorney asked leave of court to amend the indictment so as to make it read "Jonestown Bank of Jonestown." The court below, overruling the defendant's objection to the proposed amendment, granted the request of the state. The district attorney then made an amendment and announced to the court that he had done so, making the indictment read, for the name of the injured party, "Jonestown Bank, alias Jonestown Bank of Jonestown," and defendant duly excepted. It does not appear that an order of court allowing the amendment, specifying it precisely, was entered on the minutes, as required by Code 1906, § 1509, but no objection was made in the court below to the amendment on this ground. Had objection been made there, even in the motion for a new trial, the order would no doubt have been entered, as it could have been at any time, *nunc pro tunc* as of the date when the entry should have been made. The absence from the record of the minute entry cannot, therefore, be considered by this court, because of the Code provision already mentioned, Ann. Code 1892, § 4370; Code 1906, § 4936. The case of *Shurley* v. *State, Ante,* 415, 43 South., 299, decided by this court April 1, 1907, cited by appellant, is not at all in point. There the district attorney, without leave of the court, amended the indictment by erasing one name as that of the injured party and by interlineation inserted another, and special exception was taken thereto in the court below.

The variance between the indictment and the charter touching the name of the bank was immaterial, and the amendment, consequently, need not have been made; but, being made, it was

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harmless, and reversible error cannot be predicated of it. *Putnam* v. *United States,* 162 U. S., 687, 16 Sup. Ct., 923, 40 L. Ed., 1118, was a case like this, where an officer of a bank was indicted for embezzling the funds of the bank. There the name of the bank as written in the indictment was "National Granite State Bank." Its charter, or real, name was "National Granite State Bank of Exeter." There the prosecutor properly treated the variance as immaterial. The defendant was convicted, and upon appeal brought the question before the supreme court of the United States, and that great tribunal, without a dissent on the proposition, said: "It is impossible . . . to suppose that the omission of the words 'of Exeter' could have in any way misled the defendant or failed to convey to his mind what bank was intended to be referred to. It was manifest, therefore, that the omission could not have operated to his prejudice." In *Rogers* v. *State,* 90 Ga., 463, 16 S. E., 205, the defendant was indicted for stealing a bale of cotton from the "Central Railroad & Banking Company," and the proof showed that the cotton was stolen from the "Central Railroad & Banking Company of Georgia." The supreme court of Georgia, per LUMPKIN, J., said: "In point of fact there can scarcely be a doubt that the accused, his counsel, the court, jury, and all others concerned knew perfectly well that the corporation to which the proof related was that to which the indictment referred. . . . Tested by the evidence, the name in the indictment is correct so far as it goes, and only lacks two words of being exactly correct. The result of their omission is simply, we think, a slight misnomer. . . . It cannot be more serious than a like misnomer in the name of an individual." The sentences quoted from the two cases last cited are as applicable to the case before us as they were to the causes in which they respectively were uttered. Two other cases of like import will be noted. In *State* v. *Hayes,* 78 Mo., 600, an indictment alleging embezzlement of "public moneys belonging to the school fund of North township," was held to have been sus-

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tained by proof of embezzlement of moneys belonging to the "subdistricts of North township." In *State* v. *Smith,* 13 Kan., 274, the accused was charged before the examining magistrate with embezzling $67,000 of the funds of the county of Leavenworth, and in the information afterwards preferred against him by the prosecuting officer he was charged with embezzling $67,378.42 belonging to divers designated funds in the treasury of the county of Leavenworth. To the information defendant filed a special plea, averring that he had not had a preliminary examination—in that state at that time a necessary prerequisite to a prosecution by information—as to the embezzlement of any money belonging to any other person than the county of Leavenworth, and that he had not waived his right to such examination. The plea was held bad by the trial court, and the supreme court of Kansas adjudged that there was no error in the ruling.

Before entering upon the trial, the defendant applied to the court for an order requiring the state to furnish him a bill of particulars, and the court granted the order. The bill of particulars furnished by the state under the order proved unsatisfactory to the defendant, and he made objections to it; but the court overruled his objections, and this is assigned as error. It was in the discretion of the trial court to grant or deny the application for a bill of particulars; and, in the absence of gross abuse of that discretion, this court will not reverse a conviction because of the action of the lower court upon the subject. 1 Bishop on Criminal Procedure (Ed. 1866), § 286; 3 Ency. Pl. & Pr., 524. Of course, if this court would not reverse for a refusal to order a bill of particulars, it will not do so because of exceptions taken to one which had been rendered. In this case, it may further be said, after the introduction of its testimony in chief, the state was required to elect upon which items of the charges supported by the evidence it would base its demand for a conviction, and it elected two items, definitely designated, of the same date, thereby removing all probability

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of the defendant having been prejudiced by the refusal of the court below to require the bill of particulars to be made more certain. Nor was defendant prejudiced by the fact that the state was allowed to elect two items of the charges made by the evidence upon which to press for a conviction, since in respect to the smaller of said items, the one for $12.75, or, as sometimes mentioned in the record, for $22.75, the testimony so far fails that no reasonable person could believe the conviction was based upon it. Its election by the state was necessarily harmless, and the judgment appealed from must stand, if it can be supported at all, upon the sufficiency of the evidence to support a conviction predicated of the other, or $500, item, also elected by the state.

The seventh, eighth, ninth, and fifteenth assignments of error, and the seventh, ninth, twenty-third, and twenty-seventh grounds of the motion for a new trial are each and all predicated of rulings adverse to appellant made in the course of the trial on the admission or rejection of evidence; but there is no specification of the particular rulings complained of in the motion for a new trial, save in the twenty-seventh ground, where the testimony therein referred to is specially designated.

If it be conceded that this court is under duty—by no means true—to search throughout lengthy records like the one in this case, containing a great number of closely and badly typewritten pages, and to detect and decide upon every ruling touching the evidence made by the court below, yet nothing is better settled than that the circuit court, on the hearing of a motion for a new trial, is under duty to consider only the reasons therefor assigned in writing. Code 1892, § 739; Code 1906, § 801; *Barney* v. *Scherling,* 40 Miss., 320; *Armstrong* v. *Whitehead,* 81 Miss., 35, 32 South., 917, and the authorities quoted in the opinion in that case. Thompson, in the first volume of his work on Trials (section 709), speaking of motions for new trials, says: "A general complaint that the court erred in admitting illegal, incompetent, and irrelevant evidence, or in

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refusing to admit legal, proper, and relevant evidence, does not direct the mind of the court to the errors complained of, and such a motion is properly overruled for that reason alone." The supreme court of Rhode Island, in *Barrows* v. *Keene,* 15 R. I., 484, 8 Atl., 713, speaking of the requisites of an application for a new trial, called there a "petition," says: "Of course, we do not mean that the petition ought to have reported the testimony in full; for such a report might unnecessarily cumber the files of the court, and might be censurable for another reason, namely, that it might oblige the court to go through a heap of testimony, much of it irrelevant, to find and sort out that which is pertinent. This is a labor which properly belongs to the petitioner's counsel. A petition like this ought to state the testimony, or its purport, with such fullness as will show the nature of the case, and bring out clearly the points on which the rulings were given or refused, so that the court may see whether any error was committed which calls for correction." While the Rhode Island practice is different from ours, and while we do not adopt the sentence above quoted in full, we do adjudge it to be altogether improper for counsel to impose upon the courts labor which properly belongs to themselves, and a motion for a new trial on the ground of erroneous rulings in the admission or rejection of evidence should designate each of the particular rulings complained of, and make such specific reference to the evidence as will clearly suffice to draw the mind of the trial judge to the consideration and review of the exact rulings, sought to be questioned; and, if the motion for a new trial fail to do so, this court will not on appeal reverse because of any ruling on the evidence made by the trial court, since it cannot be known with certainty in such case that the question involved was brought to the attention of the court below in the motion for a new trial.

In *Gate City Gaslight Company* v. *Farley,* 95 Ga., 796, 23 S. E., 119, the following grounds in a motion for a new trial were adjudged to be so vague, general, and indefinite as not to

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indicate the errors alleged to have been committed, viz.: "Because the court erred, in that the court illegally withheld from the jury material evidence against the demand of the defendant." "Because of the illegal admission of material evidence to the jury against the demand of the defendant." Contrast with these grounds, condemned by the Georgia supreme court, the following from this record, viz.: "(7) Because the court erred in admitting incompetent evidence for the state over the objections and exceptions by the defendant." "(9) Because the court erred in excluding competent evidence offered by the defendant." These grounds for a new trial fall within the condemnation of the Georgia court, and within our condemnation. This court might hunt through the stenographer's report of the evidence, and find every instance where rulings adverse to the appellant were made in the progress of the introduction of the evidence; but we cannot by so doing find assurance that any particular ruling was brought into review by the motion for a new trial, and the trial judge thereby given an opportunity to correct the error, if any, made by him. He did not have the stenographer's report of the evidence before him. That was filed and made a part of the record many days after the motion for a new trial had been heard and denied. Many authorities hold that a motion for a new trial, which refers to the evidence as contained in the bill of exceptions or other writing not filed when the motion was acted upon, although filed thereafter, presents no question concerning the evidence, as it is too indefinite. *Noble* v. *Dickson,* 48 Ind., 171; *McCammack* v. *McCammack,* 86 Ind., 387; *Arbuckle* v. *Biederman,* 94 Ind., 168; *Harvey* v. *Huston,* 94 Ind., 527; *Cain* v. *Goda,* 94 Ind., 555. We cannot tell from this record that the attention of the trial judge was directed on the motion for a new trial to any particular piece of evidence upon which he ruled during the trial, save that specified in the twenty-seventh ground for a new trial. The supreme court of Connecticut in *Hoey* v. *Hoey,* 36 Conn., 386, said: "A motion [for a new trial] of itself must show clearly

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what the error is which is claimed to have been committed by the court, and the court is not bound to help it out by any favorable construction or supposition." In *Rooney* v. *Grant*, 40 Ga., 191, a motion for a new trial was adjudged to have been properly overruled, because it did not assign special grounds upon which a new trial was claimed; and in *Cox* v. *Weems*, 64 Ga., 164, a motion for a new trial was adjudged too vague to support an assignment of error.

Proceeding to decide the question presented by the twenty-seventh ground for a new trial, wherein it is distinctly specified that the court erred in permitting two witnesses, Hyman and Longino, to testify as to alleged confessions said to have been made by defendant, we are of the opinion that the statements of defendants testified to by the witnesses were admissions against interest, rather than confessions of crime, and that they were admissible; but, if they be treated as confessions, they were voluntary, and the court below did not err in allowing them to be given in evidence.

The defendant requested a peremptory instruction in his favor, but the court below refused to give it, and this is assigned as error. The appellant claims that it should have been given, because he was indicted for embezzling a designated sum of money, and not a general balance of account, or checks, or credits; that the state had elected to demand a conviction upon one or both of two specified transactions, both dated in December, 1905, and that, all the facts testified about each and both of them being admitted to be true, there was nothing to prove or which tended to prove that defendant had embezzled money; that the testimony touching one of these transactions did not tend to show wrongdoing of any kind, and the evidence in respect to the other could only be said to show, or tend to show, a misappropriation to the extent of $500 of a credit due from a bank in Memphis to the Jonestown Bank, and that a misappropriation of a credit is not the same thing as embezzling money. The facts, as the jury were justified in finding, in re-

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gard to the transaction upon which appellant's conviction must be upheld, if at all, are these: The Jonestown Bank, of which defendant was the cashier, was on December 2, 1905, financially in a failing condition, and he knew it was not in a position to make him a loan of $500. His account was greatly overdrawn, and he owed the bank so largely that he necessarily knew that, were the bank unembarrassed, a reasonably prudent officer, in the absence of payment of or security for the existing debt, would have refused to make a loan to him. Nevertheless, being in Memphis, Tenn., the defendant on that day drew his check on the Jonestown Bank in favor of the Conaulk Millinery Company for $500, and presumably, since the check was collected, paid the company that much money. The millinery company indorsed the check to the North Memphis Savings Bank, which deposited it, on or before December 5, 1905, in the Bank of Commerce & Trust Company, of Memphis, Tenn. The Bank of Commerce & Trust Company indorsed it for collection to the American Express Company, and that company presented it to the Jonestown Bank on December 8, 1905, and at the same time presented to the bank for collection one or more other checks drawn on it, and which the express company held for collection for the Bank of Commerce & Trust Company. The defendant had returned to Jonestown before his check reached there, and was present in the bank when it with those accompanying it, all aggregating $1,114.58, was presented to the bank for payment. The financial condition of the bank had not improved between December 2, when appellant's check was drawn, and December 8, when it was, along with others, presented for payment. The bank did not pay them in money, but gave the American Express Company, appellant executing the same, its check on the Union & Planters' Bank of Memphis, Tenn., for $1,114.58, the aggregate of the several collections, including $500, the amount of defendant's check to the millinery company, payable to the Bank of Commerce & Trust Company, of Memphis, in whose favor the several collections were

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to be made by the express company. This $1,114.58 check was presented to the Union & Planters' Bank of Memphis, where the Jonestown Bank had funds on deposit, and was paid; and $500 of the sum went to the use and benefit of defendant and in satisfaction of his check to the millinery company.

Do the facts stated and the inferences which the jury were justified in drawing therefrom, aside from the question of venue, warrant the conviction of defendant for embezzling money? *United States* v. *Royer,* 122 Fed., 844, is a case where the defendant, a clerk in a branch money order post office of San Francisco, was indicted and charged with having embezzled $1,240.55, lawful money intrusted to his care and keeping as such clerk, a part of the money order funds of the United States. It was shown upon his trial that he had issued to his own creditors a number of post-office money orders aggregating said sum on various post offices in the government, without receiving any money for them, and that these orders had been collected by the payees named in them or their assignees. It was contended for the defendant that the money paid out on the money orders by other post offices was never "under the care and keeping" of the defendant; that defendant never had or saw the money, and therefore was not guilty of embezzlement. DE HAVEN, District Judge, thought it too clear for argument that funds payable upon money orders drawn by the postmaster or clerk having authority to issue the same in the regular course of his official duty may be deemed to be intrusted to such postmaster or clerk in the sense that, if wrongfully converted by him to his own use, he is guilty of the crime of embezzlement; that such funds are in fact subject to his official order—that is, they are set apart by the government for the payment of money orders issued by him, and are thus intrusted to his official care, although they may not be in his official custody. The case of *Calkins* v. *State,* 18 Ohio St., 366, 98 Am. Dec., 121, is directly in point. The defendant in that case was indicted under a statute which made it an

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offense for a clerk or servant to embezzle property belonging to any other person, and coming into his possession or under his care by virtue of such employment. The indictment in that case charged the defendant with the embezzlement of wheat belonging to a railroad company by which he was employed as a clerk. It appeared on the trial that the railroad company had a grain elevator in which all grain arriving at Toledo by way of its road was stored, and in the transaction of this business an account was kept of each consignment of grain received. This account was kept by the defendant, and he was also authorized to issue to the owners or consignees of the grain thus stored a writing called a "grain order," and to subscribe thereto the name of the general agent of the company, and upon presentation of such order to issue a shipping order to the holder. The court in that case said: "Such being the duties and powers of Calkins under his employment, the evidence further shows very satisfactorily that while so employed he clandestinely issued fictitious grain orders, caused them to be sold in market, and appropriated the proceeds of the sale to his own use, and that he subsequently issued shipping orders based upon the fictitious grain orders, which resulted in the delivery by the company of the amount of grain named in them to the holders. On this state of proof it was claimed on behalf of the prisoner that the wheat in the warehouse, and alleged to have been embezzled, was not 'under his care,' and that no wheat passed from the warehouse into his possession. The court below held otherwise, and this is assigned for error. We are of opinion that the court below did not err in its holding on these points. There is no more reason why courts should allow themselves to be misled by mere names and shadows in the administration of justice in criminal than in civil cases. Calkins, under and by virtue of his employment, had the wheat in the warehouse of his employers so far under his care and possession and control as to give him the power to make an efficient transfer of title to any part of it to any person who should become the *bona fide*

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purchaser of a grain order issued by him in the name of Baldwin, a transfer of title effective in favor of the holder of such order and against his employers. The power was used to divest his employers of their property and to put the proceeds of it into his own pocket. We think he had all the care of the property which the statute contemplates, and that when he clandestinely transferred the title of wheat from the railroad company to an innocent holder of a grain order, and appropriated the proceeds thereof to his own use, the act of embezzlement was complete."

These cases are decidedly pertinent to the question under consideration, and a careful consideration of them leads us to add the approval of this court to the reasoning upon which they are based. The key to them is to be found in the language of the supreme court of Ohio in *Calkins* v. *State, supra,* upon which too much emphasis cannot well be put. The court said: "There is no more reason why courts should allow themselves to be misled by mere names and shadows in the administration of justice in criminal than in civil cases." The federal court case was, of course, decided in recognition of the fact that every money order post office in the United States upon which the defendant was authorized to issue money orders does not have on hand at all times funds specially set aside with which to pay such orders, since it is a matter of common knowledge that the cashing of money orders, especially at the smaller offices, is occasionally deferred, when first presented for payment, until the incoming of funds with which to take them up. The defendant in that case would have been guilty, had each of the money orders drawn by him been drawn on a post office not having on hand at the time the order was drawn, or when it was presented for payment, one cent with which to take it up, if they were paid at any time after they were first presented. The case was correctly decided, not so much because the defendant was authorized to draw upon specific funds belonging to the government as because he constituted the payees, in the

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money orders his agents to receive government funds, and enabled them to obtain possession of such funds and to appropriate the same to his benefit, the acquittance of himself from the debts previously due them. The funds, when paid over to the payees on the fraudulent orders issued by defendant, were no more rightfully in their possession than if defendant had furtively reached his arm into the government's places of deposit in the post offices on which the orders were drawn and had extracted the money and paid it over to the payees, and the funds remained the funds of the government, and the money itself was embezzled by defendant when it was appropriated by the payees, being thereunto authorized by him. The Ohio case is supported by like reasoning.

In the case at bar it makes no difference that the Jonestown Bank did not have a special deposit in the Union & Planters' Bank of Memphis, set apart only to be used in cashing its drafts, or that its deposit was a general one, creating between them the relation of debtor and creditor. Had defendant drawn the $1,114.58 check (including, as it did, the $500 aforementioned), payable to bearer, or to his order, and had himself gone to Memphis and presented it for payment to the bank upon which it was drawn, that bank would have separated from its funds the necessary sum of money with which to pay it, and would have paid it on the order of the Jonestown Bank; and when defendant so received the money, $500 of it being paid to him, on the facts as established by the verdict, by reason of his fraud, whose money would the $500 have been? Unquestionably it would have been money which defendant in equity and good conscience should have treated as the money of the Jonestown Bank, and he should have delivered it to the bank. Failing to do so, and converting it to his own use, he unquestionably would be guilty of embezzling the money of the Jonestown Bank. It makes no difference that defendant did not himself go to Memphis and personally collect the check of the Jonestown Bank, which he had in part, and to the extent of

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$500, as found by the jury, fraudulently drawn on the Union & Planters' Bank. He constituted the payee in that check his agent to collect the money, and the same was collected to the extent of $500 for his benefit and appropriated for his own use. The facts of the case and the legitimate inferences to be drawn from them justified the jury in finding the defendant guilty of embezzling $500 of the bank's money, and the court below did not err in refusing the peremptory instruction asked by the defendant.

We are unable to recognize the force of the suggestion made by appellant's counsel to the effect that the conviction cannot stand because of deposits made by defendant in the bank at various times, and especially the one for $504 made December 4, 1905, after he had drawn the check for $500 in favor of the millinery company, but before it was taken up at the bank. The deposit, as all others made by him, was made generally, and not as a special one, to be used in paying the check in favor of the millinery company; and in the absence of any showing to the contrary the jury were warranted in treating the rule for the appropriation of payments in civil cases as applicable, and the state of the evidence is such as to support the finding that defendant did not provide in any way for the payment of the check found to have been fraudulently issued by him.

The question of venue is raised, and defendant's counsel insist that the statute (Code 1892, § 1330; Code 1906, § 1402), providing that embezzlement may be prosecuted in the county in which the defendant was under obligation to pay over the funds is both inapplicable and unconstitutional. We do not pass upon the questions thus presented, because we think the case is within Code 1892, §§ 1132, 1133 (Code 1906, §§ 1404, 1405)—the first one providing that where an offense is committed out of this state and consummated in it, or where an offense is consummated in this state by means or agency proceeding from a person out of this state, the person so commencing such offense or putting in operation such means

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or agency, although out of the state at the time such offense was actually consummated, shall be liable to indictment and punishment therefor in the county in which the offense was consummated; and the other providing that where an offense is commenced in this state and consummated out of it, either directly by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded. Of course, under these statutes, it is quite immaterial, so far as concerns venue, whether we regard the offense as having been begun in Tennessee and consummated in this state, or begun here and consummated there.

Another assignment of error is based upon improper argument to the jury by one of the prosecuting attorneys. It is the duty of trial judges to give attention to the argument of counsel in every case, especially in criminal cases where the temptation to exceed proper limits seems to be great, and, with or without objection, to exercise the power in them vested to see that the trial is fair and impartial, and the argument of counsel is a part of the trial. Defendants are often loath to object to argument which they know to be improper, for fear so doing will be misunderstood or misconstrued by the jury; and the trial court should not hesitate, of its own motion, to prevent all abuses of the right to argue a cause to the jury. Right-thinking counsel will welcome a suggestion from the court in the way of admonition that they are dangerously near or over the line which separates the proper from the improper, and will cheerfully conform to the right All others, if there be others, should be made to respect the rights of even the humblest individual, although charged with crime. In this case, however, we cannot consider the assignment of error, because the objection was not made to the improper statements of counsel at the time they were made, or at any time before verdict.

The court below did not commit reversible error either in

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giving instructions for the state or in refusing or modifying those asked by defendant. Considered as a whole, the instructions were not misleading and they fairly presented the law of the case.

The assignments of error not otherwise mentioned herein are without merit.

Affirmed.

GEORGE W. STAPLE *v.* VICKSBURG WATERWORKS COMPANY.

[44 South., 766.]

CONTRACT. *Guaranty. Past Debt. Construction.*

A tentative and provisional arrangement made between a third party and a water company, evidenced by writing, by which the company was induced to supply water to the owner of a laundry, does not bind the third party to pay a debt due at the time the arrangement was perfected from the owner of laundry to the water company.

FROM the circuit court of Warren county.

HON. JOHN N. BUSH, Judge.

The Waterworks Company, appellee, was plaintiff in the court below; Staple, the appellant and others, were defendants there.

FROM a judgment in plaintiff's favor, defendant, George W. Staple, appealed to the supreme court.

The declaration contained two counts. In the first count appellant Staple, his brother, W. H. Staple, and one Geisler, were sued as partners, and in the second count appellant was sued as a guarantor. W. H. Staple and Geisler pleaded the general issue, and appellant pleaded to the first count of the declaration that he was not a partner of or with his codefendants, who did business under the name Troy Laundry, and that he had no interest whatever in the laundry, except that he had loaned money to W. H. Staple to assist him in establishing the business and to the second count he pleaded the general issue. At the con-

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Brief for appellant.

clusion of the evidence the trial court gave a peremptory instruction for plaintiff.

McCabe & McCabe, for appellant.

The appellee failed to prove liability on the part of appellant upon either of the counts of the declaration.

The only facts offered to show that appellant was a partner were substantially the following: A short while before the failure of the Troy Laundry, G. W. Staple's name appeared upon the window of the place where the business was being conducted, but there was no proof that it was put there by him, or by his authority; and it was put there long after the debt in this case contracted. The plaintiff also proved that appellant was attached in the justice court of Warren county, as a partner in the Troy Laundry. This was the rankest heresay, and was not admissible and was duly objected to by appellant, and is assigned for error here. The plaintiff also proved that when the laundry failed, the machinery was shipped to appellant at Meridian, and this was all the evidence offered to prove that appellant was a partner.

If any of the foregoing evidence was admissible, which we dispute, it did not show that appellant was a partner in the Troy Laundry, but it was all explained by the testimony of the defendant that he was never a partner in that business. It was shown that he had nothing to do with the placing of his name on the window and that he did not know of it until afterwards. His brother, W. H. Staple, was largely indebted to him, and when he found that he was about to fail in business, he undertook, of his own motion, to protect appellant by making a bill of sale to him of the plant. In regard to the attachment in the justice court, it was shown that the attachment was sued out from information obtained by the witness, who did not remember whence he obtained it. It was also shown that the amount involved in the attachment suit was after the suit guaranteed by appellant and paid by him.

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Brief for appellant.

The laundry plant was shipped to Meridian to appellant because he had a claim on the same, growing out of the fact that he had lent money to W. H. Staple, his brother, to conduct and carry on the business.

It is contended that the letter of December 7, 1904, contained a promise on the part of appellant to pay the amount sued for in the declaration, $324.66. This contention, we deny. It is true, no doubt, that the purpose of Crumpler, in writing to G. W. Staple, was to get from him a written promise to pay this bill.

If appellant is bound for the payment of this debt by this correspondence, he is not bound by what Crumpler wrote, or by what Crumpler wanted him to write. But he is bound by what he wrote himself, in other words, he is bound, if bound at all, by his own letter, by his own language, by his own words and not by the language, letters or words of Crumpler. Looking to appellant's letter we find that he purposely avoided promising to pay the indebtedness. He started out by saying that he would come over to Vicksburg in a few days and talk over the matter with Crumpler. If he had intended to pay the whole debt he would have said so at once instead of promising to come over and see about it. It was also manifest that he was not satisfied with the rates that Crumpler was charging his brother, and he wanted to see if he could not get the rate reduced; but as Crumpler had written him that unless something was done "he would have to shut off the water and bring suit at once," appellant offered a substitute for Crumpler's proposition.

The true construction of appellant's letter is this: That he would make payments each week as long as he felt or thought it was advisable for him to do so, and that whenever he got ready to quit making these payments he would do so. In his testimony he says that he was anxious for the laundry to keep going, with the hope that his brother might, while it was going, make an advantageous sale. Of course as soon as it was shut

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Brief for appellee.

down, it would not sell for half price. We feel quite sure that the learned judge below erred in construing this letter as an absolute and unqualified promise to pay the debt sued for, and in giving a peremptory instruction to the jury to find for the appellee.

McLaurin, Armistead & Brien, for appellee.

This case can be determined by the construction of the three letters found in the record. In the letter of the Vicksburg Waterworks Company, December 5, 1904, appellant is advised why the water company called on him for the payment of its past due water bills and for those to accrue during the operation of the Troy Laundry. In that letter appellant is advised that his brother W. H. Staple had informed appellee that appellant was the proprietor and had agreed to pay all past and future water bills, and therefore the appellee called on appellant for the payment of these bills, suggesting that he would let them be paid in $20 installments weekly.

Reading the letter of December 7, 1904, written by appellant to appellee in the light of the letter of the appellee dated December 25, 1904, and as an answer to appellee's letter of December 5, 1904, is the only way by which the court can get at the intention of the parties. It seems incredible to say that appellant did not admit all that appellee claimed in its letter of December 5, 1904, because, without denying any of the statements of appellee's letter, appellant, in his letter replying to same, of December 7, 1904, makes arrangements for the payment of the debt. And in the concluding part of appellant's letter he says:

"When I do not pay the drafts so made out or arrange otherwise to protect you, then turn off the water or whatever is proper in the case, and you can commence this arrangement on next Monday."

This is another recognition that he was the proprietor of the establishment and was promising in this letter to arrange so

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as to protect appellee's debt. So the court will see from the appellee's letter to appellant, and appellant's answer thereto, that there is no denial in appellant's answer to any of the information gotten from appellant's brother written to appellant by the appellee; on the contrary, appellant acquiesces in all the information contained in appellee's letter of December 5, and promises to "arrange to protect."

Counsel for appellant, in their brief, insist that the appellant's liability must be determined solely and exclusively by the technical language of appellant's letter to appellee of December 7, 1904, without reference to anything else; that it must be construed in the light of an answer to appellee's letter of December 5, 1904, and must not be considered in reference to any of the matters stated in appellee's letter of December 5, 1904. This is entirely too narrow a view to take of this transaction; to get at the intent of the parties it is proper for the court to consider all the letters together about the same subject matter. Going through the record the court will find that the Troy Laundry was not a successful undertaking and that appellant undertook to become the owner of all the machinery in the store and had loaded it on the cars to be shipped to himself at Meridian, and after he thought he was safe from the reach of the law, he then, for the first time, repudiates the water bill which he had promised to "arrange to protect" as stated in his letter of December 7, 1904. Showing that this was the understanding of appellant, he went ahead and paid two checks for $20 each, drawn against him in paying the weekly installments mentioned in appellee's letter of December 5, 1904, as a means of liquidating the indebtedness. And when the third instalment fell due, he declined it because he had undertaken to get the property away from Vicksburg and in his possession in Meridian. The purpose of all this is manifest from the record as appellant states in his own testimony that he paid these checks for the purpose of not having the water shut off from the Troy Laundry while he was operating it in Vicksburg, be-

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cause he was advised in appellee's letter of December 5, 1904, that unless the $20 was paid each week, he would have to shut off the water and bring suit. Appellant was fully advised of all these facts when he wrote his letter in reply and proceeded to pay $20 mentioned in appellee's letter and to use the water until such time as he thought he could escape further payments and he seeks now to appropriate the property and let the water company lose its debt, because the record shows that the other members of the partnership are insolvent. To sustain the contention of appellant would be to crown a trick with success.

WHITFIELD, C. J., delivered the opinion of the court.

There is no evidence whatever of any partnership between G. W. Staple and the other two persons, W. H. Staple and Geisler. Learned counsel for appellant state that the peremptory instruction was given by the learned circuit judge not on the ground that there was a partnership, but on the other count in the declaration—that G. W. Staple had become a guarantor of the past indebtedness of the Troy Laundry, amounting to some $262.02. This contention turns exclusively upon the construction placed upon the following letter and reply, before setting out which it will be necessary merely to say that the Troy Laundry, a partnership consisting of W. H. Staple and Geisler, got into failing circumstances and was due the appellee company $262.02 for arrearages of water charges. The manager of the appellee company, ascertaining the situation, wrote the letter and received the answer set out below. The only connection shown by the evidence between G. W. Staple, and his brother, W. H. Staple, is that W. H. Staple was the younger and only brother of G. W. Staple, that G. W. Staple had furnished the money necessary to enable W. H. Staple and Geisler to buy the plant originally, and had subsequently loaned him other sums of money, and that, when the crash came, W. H. Staple and Geisler executed a deed of trust to G. W. Staple to

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secure him in payment of the sums of money advanced by him to his brother, W. H. Staple. The correspondence referred to is as follows:

Waterworks to Staple.

"VICKSBURG, MISS., December 5, 1904.

"G. W. Staple, Meridian, Miss.—Dear Sir: We have just been down to the Troy Laundry to see about the account the laundry owes us, and your brother tells us you are now the proprietor, and that it was understood you were to pay the water company's bills for the past and future as long as you run the plant. The amount that is due up to December 1, 1904, is $262.02. Part of this has been used since you have been the proprietor. We told your brother this morning that if you would give us your guaranty in writing or in notes payable along to suit you, provided it was not less than $20 a week, we were willing to wait and let it be paid in that way; otherwise, we would have to shut off the water and bring suit at once. But, before taking action, we will wait a few days on you. Kindly let us hear from you by return mail.

"Yours truly,

"VICKSBURG WATERWORKS CO.,

"M. O. Crumpler, Mgr."

Staple to Waterworks.

"MERIDIAN, MISS., December 7, 1904.

"The Vicksburg Waterworks, Vicksburg, Mississippi—Dear Sir: I have your letter and hasten to answer the same. I expect to come over there in a few days, and am now arranging my affairs so I can come. I would like to talk over this matter with you personally. I pay fifteen cents a thousand gallons, and that has always been considered ample by the water company here. I understand that your price is something over twice this. Don't you think you can make me a reduction? However, I will call on you as soon as I get there and see

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about the matter. As to present I would like for you to do this: You call on my brother each Monday morning, and ask him for the amount right there. I would like you to be a little easy on him by making it $15. If he pays a part, draw on me on that day for the balance due for the preceding week; and if he pays all, let it go at that. When I do not pay the drafts so made out, or arrange otherwise to protect you, then turn off the water, or whatever is proper in the case, and you can commence this arrangement on next Monday. Trusting this will be satisfactory to you, I am,

"Yours truly,

"GEO. W. STAPLE."

What occurred after this correspondence was the failure of W. H. Staple to pay the $20 on two occasions, and the payment of the same upon draft being made upon him by Geo. W. Staple to appellee. The appellant says that he expected to go over to Vicksburg in a few days, that he would like, when he got there, to talk this matter over personally with Mr. Crumpler, and that he thought the appellee was charging too much for its water, and then concludes by directing him, for the present, to call on his brother every Monday morning, and ask him (the brother), as the debtor, for the amount, and then adds that, if his brother did not pay, Crumpler might draw on him for the balance due—not for arrearages, but for the balance due for the preceding week—and then finally says that, if he did not pay the drafts so made, Crumpler could proceed as he chose. All this was a mere tentative and provisional arrangement, from which we do not think there can be deduced any undertaking on the part of G. W. Staple definitely and certainly to become a guarantor for the indebtedness of the Troy Laundry. On the whole case there should have been a peremptory instruction to find for the defendant.

Reversed and remanded.

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Statement of the case.

JOSHUA P. SHERROD v. STATE OF MISSISSIPPI.

[44 South., 813.]

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Demurrer. Waiver. Supreme court practice.*

On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the court below.

2. SAME. *Forgery. Evidence. Witnesses. Contradiction.*

In a prosecution for forging a promissory note, the defense being that the note was genuine and given for money loaned by defendant, if the prosecutrix be permitted to testify, it appearing that she received from defendant a sum of money equal to the amount of the note, that as an officer of an insurance company defendant collected an insurance policy for a greater sum on the life of her deceased husband and that the money received was a partial payment on that account, it will be error to refuse defendant's offer to show (a) that he was not an officer of the insurance company, (b) had never made collection of the insurance mentioned, and (c) that nothing was ever due on the policy, it having lapsed before the death of the insured.

3. SAME.

Where in such case the prosecutrix testified that defendant was indebted to her, the defendant, being a witness in his own behalf, should not be prohibited from testifying that he was not so indebted.

4. SAME.

Where in such a prosecution for forgery the prosecutrix testified that she was not indebted to defendant but that he was indebted to her on the proceeds of insurance on the life of her deceased husband, it was error, proper predicate having been laid, to refuse to allow defendant to show that she had stated that her husband failed to pay premiums and the policy had lapsed before his death and that he owed defendant the amount of the note.

FROM the circuit court of Claiborne county.

HON. JOHN N. BUSH, Judge.

Sherrod, the appellant, a negro physician, was indicted and

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Statement of the case.

tried for forgery, convicted and sentenced to the penitentiary for five years; and appealed to the supreme court.

The indictment contained two counts, the first being for forgery of a paper purporting to be a promissory note for $100 payable to appellant, signed "Cynthia Green." The second count charged that the same paper was feloniously uttered by appellant. A demurrer to the indictment specifying several grounds was filed, but no action on the demurrer is shown by the record, although it appears that appellant, being arraigned, pleaded not guilty.

The prosecutrix, Madame Green, a negress, whose name is charged to have been forged, testified that she did not sign the promissory note, but admitted receiving $100 from appellant, claiming, however, that it was part payment by appellant to her for the proceeds of a $400 insurance policy on the life of her deceased husband, collected by appellant from the Knights of Honor of the World, of which appellant was an officer. To rebut this testimony the appellant sought to introduce the policy of insurance and other documentary evidence showing that, by reason of nonpayment of dues in the lifetime of the dear departed, the policy had lapsed and was void when he died. The court refused to admit the same in evidence or to allow any questions to be propounded to any witness intended to elicit testimony tending to show such evidence, to be answered by the witness, to the effect that there was no insurance money due on the life of the decedent. The appellant sought to show by his witnesses and himself to testify, that he was not indebted to Madame Green, that he never collected any insurance money; and that the woman had stated to different persons that her deceased husband failed to pay his assessments or premiums in his lifetime to the Knights of Honor of the World, and that she had admitted to several persons that she owed appellant the sum of of $100, the amount of the note for money loaned her by appellant. The court below refused to admit such evidence.

The opinion of the court further states the facts.

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Brief for appellant.

J. McC. Martin, for appellant.

The court below erred in not sustaining appellant's demurrer to the indictment. The indictment failed to comply with Code 1906, §§ 1187, 1192, defining the statutory crime of forgery, and of uttering false instruments. A comparison of the indictment with the statute will show that the demurrer should have been sustained. To fall within the law, the charge must be in the language of the statute. The indictment must pursue the precise and technical language employed in the statute in the definition or description of the offense. *Scott* v. *State,* 2 George, 478; *Williams* v. *State,* 42 Miss., 329; *Dee* v. *State,* 68 Miss., 602; *Burgess* v. *State,* 81 Miss., 482.

The prosecutrix, Cynthia Green, whose name is charged to have been forged, testified that the appellant was indebted to her by reason of her connection with the local lodge which, according to her testimony, had insured her deceased husband's life, and that appellant had paid her $100 of this amount. Subsequently, when the appellant was upon the stand in his own behalf, his counsel, in order to controvert the testimony of the woman, asked appellant whether he owed her $400, or any part thereof. Appellant's answer was, "I do not owe her a thing." On the objection of the district attorney, this question and answer were excluded. The refusal of the court to allow appellant to testify, as shown, constitutes reversible error, under the circumstances. This prosecutrix also testified that her deceased husband's policy for $400 was in appellant's hands, and that he owed her that sum on account of the policy, and had paid her only $100 on account of the same and was to pay her different instalments of $50, until the whole was paid. To controvert this testimony, the appellant sought to show by his testimony that he was in no way connected with the insurance society, that he never received any funds of, nor was indebted to, Madame Green, and that the policy of insurance on the life of her husband lapsed, and become void, before the death of the insured; and appellant sought to intro-

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Brief for appellant.

duce, in evidence, the policy itself and other documents to show the correctness of his contention. It was error in the court to refuse to allow the evidence.

"The object of a trial is to ascertain the truth of the facts in issue between the parties. This may be done by evidence addressed directly to such facts, or facts relevant to the issue. As a general proposition, therefore, it may be said that any evidence tending in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant." Elliott on Evidence, sec. 144.

John L. Frierson, on the same side.

The prosecutrix, while denying that she executed the promissory note, payable to appellant, for $100, admitted, in her testimony, that she did receive from him $100; but claimed that this was a payment on an alleged insurance policy, payable to her, on her deceased husband's life. Appellant's testimony was that the $100 was a loan to Madame Green, to aid her to start in the restaurant business. The learned district attorney was allowed to question Madame Green at considerable length before the jury about the policy of insurance, placing clearly before them the state's idea that appellant owed her, and had promised to pay her, the face of the policy, $400, and had actually paid $100 toward liquidation of the debt. When counsel for appellant, on cross-examination of The Madame, made inquiries about the policy, and the alleged debt due thereunder, and sought to introduce the policy in evidence, the court, on the objection of the district attorney, refused to allow cross-examination on the subject, and declined to allow the policy to be placed in evidence, and declined to allow appellant to introduce evidence to show that Madame Green had stated to several different parties, before the trial, that she owed appellant $100, evidenced by the note. The action of the court was partial to the state, and constituted reversible error. Elliott on Evidence,

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Brief for appellee.

sec. 144. *Prior* v. *Oglesby,* 39 South Rep., 593. Certainly, the issue was one of fact, rather than of law, and it was not for the judge, but for the jury, to pass upon the same. *Decker* v. *Bryant,* 7 Barb. (N. Y.), 183; *Clinton* v. *Rowland,* 24 Barb. (N. Y.), 634. The recognized rule is, that the examination in chief should be more restricted than the cross-examination; but here the tables were turned, and while the examination in chief of Madame Green extended through a large latitude, her cross-examination by appellant was restricted to a small part of what was brought out on direct examination. Appellant's legal rights were prejudiced thereby. *Buckner* v. *Buckner,* 12 Nevada, 423; *Baird* v. *Bailey,* 68 New York, 547; Rapalje's Law of Witnesses, 246; Thompson on Trials, 405; *Taggart* v. *Bosch,* 48 Pacific Rep., 1092.

Either the prosecutrix or the appellant told an absolute falsehood. If for no other purpose than to enable the jury to pass upon the verity of the statements, and get the same clearly before them, the cross-examination of Madame Green, as attempted by counsel for appellant, should have been allowed. She was asked, on cross-examination, concerning statements alleged to have been made by her at former and different times, contradictory to her testimony in chief, and, since her testimony was of importance, it was error in the court below to refuse to permit appellant subsequently to show that the woman had stated to third persons, that her husband, on whose life the insurance was claimed to have accrued, had not paid his assessments, that the policy had lapsed, and that she owed appellant $100 for money loaned. *Martin* v. *Elden,* 32 Ohio St., 282; *Baird* v. *Bailey,* 68 N. Y., 547.

George Butler, assistant attorney-general, for appellee.

In answer to the contention of learned counsel for appellee, that the court erred in not sustaining appellant's demurrer to the indictment, we call the court's attention to the fact that the record in this case fails to show any action by the circuit court

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on the demurrer. In answer to the certiorari issued from this court, the clerk of the circuit court below certified that no action was taken on the demurrer. Hence, this court must treat the demurrer as having been waived, or withdrawn. 10 Enc. of Plead. & Prac., 573.

It is insisted by appellant that the court should have permitted him to show that the policy on the life of the husband of Madame Green had lapsed by reason of the nonpayment of premiums. Under all the evidence this was immaterial. It will be noted that appellant was not restricted in his cross-examination of the witness, Madame Green, as to how, when, where, and on what account she received the $100. The first objection of the district attorney, sustained by the lower court, came when she was interrogated by counsel for appellant with the view of laying a predicate to contradict her as to whether or not she had stated to certain third persons that the policy had lapsed. When she denied this conversation, appellant was bound by her answer. *Williams* v. *State,* 73 Miss., 820.

Was there error in the court below refusing to permit appellant to prove, by different witnesses, that Madame Greene had admitted to them that she owed appellant $100 for money loaned? The Madame admitted that she had received from appellant $100; and appellant testified that he gave her that amount of money; she claimed that it was paid as hush money, on account of his having the policy, while he claimed that it was passed to her as a loan. Now, the sole question at issue was, whether Madame Green signed the note. It could throw no light upon this question, to ascertain on what account the $100 was advanced. While it may be true that the testimony sought to be introduced would have tended to corroborate the testimony of appellant, it was not pertinent to the real issue. *State* v. *Pyscher,* 179 Mo., 140.

WHITFIELD, C. J., delivered the opinion of the court.

There is nothing in the record to show any action of the

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court upon the demurrer to the indictment. In answer to the certiorari the circuit clerk certifies that there was no action taken, and that none appears anywhere on the minutes of the court. It is well settled that in such case the demurrer should be treated as waived or withdrawn. 10 Ency. Plead. & Prac., 573. If there were any defects in the indictment, they were only such as might well have been cured by amendment.

The court erred in refusing to allow the defendant to testify that he did not owe Cynthia Green anything. Cynthia Green had asserted, on her direct examination, that he did. She was permitted, on her direct examination, to testify that her husband had a policy of insurance issued by the Knights of Honor for $400, and that Dr. Sherrod owed her that sum of money on account of that policy, and that he gave her $100 on that account, and was to pay her $50 along until he had paid the whole $400. The instrument in the case is a note for $100, payable in two installments of $50 each. Cynthia Green was asked, on cross-examination, whether she got $100 from Dr. Sherrod in payment of the policy issued by the Knights of Honor to her husband, and whether Dr. Sherrod was going to pay her from time to time until he had paid $400, and she replied in the affirmative to all these questions, and stated further, that he was paying her all he did pay her on account of that policy. The policy was sought to be introduced in evidence by the defendant, and it appeared from that, and the evidence in the case, that her husband had no policy, that it had lapsed, and that there was nothing due, of course, to her on such policy. Defendant's counsel offered to show, in connection with this evidence referred to, that Dr. Sherrod was not an officer of the order at all, that he never collected any assessments, that the policy had lapsed, and that nothing was due to Cynthia Green; and the court excluded this testimony. This was erroneous. The testimony should have been received. Cynthia Green was then further asked on the cross-examination if she had not told certain witnesses that she did not remember whether her hus-

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band had kept his insurance up or not, and, further, whether she had not told some of these witnesses that she knew he had not paid his assessments, and that the policy had lapsed. Much testimony along this line as to Cynthia Green's statements was offered to be introduced. Further than this, it was offered to be shown by the defendant, on the cross-examination of Cynthia Green, that she had told Andrew Courtney that she owed Dr. Sherrod $100. All this was offered to be shown on the cross-examination of Cynthia Green by Andrew Courtney, E. L. Hackworth, and Caroline Valentine. In addition to all this, appellant offered to show by Ella Young that Dr. Sherrod went to Cynthia Green to get a payment on this alleged debt of $100, and that she recognized the debt, and said that she would soon be down to his office and pay him, and, specifically, that she (Cynthia Green) then said, after her husband's death in the spring or summer thereafter, when Sherrod had tried to collect part of the alleged debt from her: "Ella, Dr. Sherrod certainly is a good man. He loaned me $100, and I am going to pay him. Anybody that would not pay Dr. Sherrod would not pay anybody." All of the testimony which we have just set out was offered to be established, on the cross-examination of Cynthia Green and by the various witnesses above enumerated, but was excluded by the court. It should all have been admitted as going to show the motive of Cynthia Green in denying her alleged signature to the instrument charged to have been forged. It manifestly tended strongly to show that her testimony in denying that she signed the alleged note was probably false, for the reason that she was interested to escape liability. It all went to motive, and was therefore competent.

We do not at this time notice any other error assigned.

The judgment is reversed, and the cause *remanded.*

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Syllabus.

LUCY MORGAN ET AL. v. INDEPENDENT ORDER OF SONS AND DAUGHTERS OF JACOB OF AMERICA.

[44 South., 791.]

1. INSURANCE. *Mutual benefit society. By-laws. Construction. Forfeitures.*

The by-laws of a mutual benefit society are to be liberally construed in favor of the insured, so as to prevent a forfeiture.

2. SAME. *Rules.*

Mutual benefit societies are subject to the same rules of law as other life insurance companies, save in so far as such rules may be lawfully modified by the objects and purposes of the society's organization.

3. SAME. *Waiver. Estoppel.*

An insurance company or benefit society can not exempt itself in advance, either by contract or by-laws, from an estoppel to assert a forfeiture of a policy where there has been a breach of conditions on the part of the insured and the society's conduct has been such as to affirmatively induce the belief that the forfeiture was waived.

4. SAME. *Case.*

Under the by-laws of a benefit society, requiring payment of one dollar in advance on the first day of each month and declaring that a member who failed to pay an assessment, on or by the day it becomes due, was thereby suspended, and providing that a suspended member could be reinstated only in a designated way; a member was not suspended who fully paid all demands for eleven years, because he was then delinquent one day in the payment of one dollar, received from him the next day, as were all subsequent assessments when due, without question.

5. SAME. *Equitable estoppel. Forfeitures. Mala fides.*

A mutual benefit society may be estopped by conduct to the same extent as a natural person, and a forfeiture of an insurance policy will not be adjudged in its favor where the insured acted in good faith and paid all the dues required and the society was not injured by any act of his.

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Brief for appellants.

FROM the chancery court of first district, Hinds county.

HON. G. GARLAND LYELL, Chancellor.

Mrs. Morgan and others, appellants, were complainants in the court below; the Independent Order of Sons and Daughters of Jacob of America, the appellee, was defendant there. From a decree in favor of the defendant, complainants appealed to the supreme court.

The complainants, as beneficiaries in a policy of insurance or death benefit certificate issued by the defendant order to one Samuel Morgan, sued to recover thereon. The bill of complaint alleged the death of the insured while in good standing as a member of the order. The certificate stipulated that payment of the benefit or amount of insurance would be made subject to the provisions of the constitution and laws of the order. The appellee's defense was that a certain monthly assessment of dues, under the constitution and laws of the order, payable on the first day of the month, was not paid by decedent until the second day of the month, and that he was, at his death, therefore not in good financial standing with the order, and, according to the laws of the order, a recovery could not be had by complainants. There being evidence to substantiate the defense, the chancery court dismissed the bill.

The facts are further stated in the opinion of the court.

Watkins & Watkins, for appellants.

The by-laws of a mutual benefit society, or order, should be liberally construed in favor of the insured, so as to prevent a forfeiture. *Murphy* v. *Independent Order, etc.,* 7 Miss., 831, 27 South. Rep., 624. The by-laws of the order were not self-executory. It is a general rule of law that a member of a mutual benefit order, who has been delinquent, does not lose his rights and benefits, even on account of delinquency, unless the by-laws of the order provide, in express and unambiguous terms, that upon his delinquency, he shall *ipso facto* stand suspended. *Harris* v. *Wilson,* 86 Mo. App., 407.

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Brief for appellants.

It will be noted that the by-laws of the appellee are, for the most part, ambiguous and inartificially drawn. It is not the duty of any court to construe the by-laws of lodges and insurance orders unfavorably toward beneficiaries; and the court can only allow a self-executory forfeiture in cases where the by-laws of the order require it in such plain and explicit terms as to bear no other construction. The by-laws in this case do not say that a member who fails to pay his dues on the first of the month, shall *ipso facto* stand suspended; but they merely say that he is suspended, which is an entirely different expression, of exceedingly doubtful meaning; and no authorities can be found, holding that a statement in the by-laws of such ambiguous nature, will operate as a self-executory suspension of a member. The appellee is a mutual benefit society, in existence among the negroes of Mississippi and Alabama, and as a mutual society it is subject to the same rules of law which govern other life insurance companies, except in so far as such rules are lawfully modified by the objects and purposes of the society. *Brady* v. *Association,* 14 N. Y. Sup., 272; *Carton* v. *Benevolence Society,* 3 Daly (N. Y.), 20.

The by-laws here in question are based upon a false statement of facts. In the case of *Murphy* v. *Independent Order, etc., supra,* this court construed a by-law of this same appellee, seeking to make the appellee's local officers and agents the agents of the individual members of appellee. Counsel who represented the appellee in the case cited, argued therein with great insistence that the by-law of the order, then under consideration, formed part of the contract between the order and its members, and should be upheld. This court, however, held that the by-law was contrary to the actual facts, that the collector of the lodge was not employed by the members, that the members had no right to discharge him, and had no right to direct and influence his actions. Thus, the court held that a by-law declaring the local officers of the lodge to be agents of the members of the lodge, was contrary to the actual facts, and void. So, in this

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case at bar, appellee's by-law, whereby it seeks to justify itself for the retention of the decedent's money, is contrary to the actual facts, and rests upon an assumption of fact not true.

Certainly, appellee, as a mutual benefit order, can be estopped by its contract in like degree as private individuals may be. The acceptance and retention by appellee of the insurance money paid by the decedent for insurance, operated to waive any suspension of the decedent, if any existed. *Lord* v. *Society,* 88 N. W. Rep., 876; *Beil* v. *Knights of Honor,* 80 N. Y. App., 609.

Certainly, where, as in this case, the decedent in good faith had fully paid all dues and assessments for eleven years, and merely failed to pay an assessment of one dollar, due on the first of the month, but which was promptly paid the succeeding day, and accepted by the appellee's agents, as were his subsequent dues, the appellee, not having notified him of his suspension, was estopped to assert that he was a suspended member, and that it was not liable on his beneficiary certificate payable to appellants. *Brotherhood of Carpenters* v. *Dunkle,* 69 N. E., 708; *Littleton* v. *Wells,* 56 Atl. Rep., 798; *O'Brien* v. *Union,* 76 Conn., 52.

Green & Green, for appellee.

The contract of insurance, evidenced by the appellee's certificate and by-laws, expressly provides that a member must be in good financial standing, before any benefit can, in any event, be paid on his account by appellee. Promptness in payment by members in an organization, such as is appellee, is absolutely requisite. After the decision of this court in the case of *Murphy* v. *Independent Order, etc.,* 77 Miss., 830, the by-laws of appellee were revised, and it was expressly provided by Art. XI, sec. 5, of the revised by-laws, that each and every member of a subordinate lodge of the order should be required to pay into the treasury of the supreme grand lodge a regular monthly advance assessment of one dollar on the first day of each month

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during every year in order to continue in force his contract of insurance. This provision, accordingly, was not in the by-laws when construed by the court in the *Murphy case, supra,* but, instead, there was a provision requiring the "worthy scribe" of the order to notify each member as to his arrears. The revision of the by-laws was expressly to comply with the decision of the *Murphy case.*

We cannot follow the learned counsel for appellants in their hair-splitting distinction between a declaration in a by-law to the effect that a member shall be *ipso facto* suspended and the declaration that he is suspended. The language of the provision of the by-laws must be given a rational construction; and we submit that a declaration that a party is "nonfinancial," is as strong a declaration in that provision, as is requisite.

Appellants do not allege in their bill of complaint that the by-laws were not self-executory, and as their claim against appellee is made under the provisions of the beneficiary certificate, which required payment by decedent of his dues upon the first day of the month, it is essential that the claim of appellants should be in accordance with the terms and provisions of the beneficiary certificate and of the by-laws referred to in the certificate, and not in antagonism to them. It is expressly provided, under the terms of the certificate, that the beneficiary should only have his benefit "paid per the provisions of the constitution and by-laws."

We ascribe unqualifiedly to the doctrine that where a contractual relation exists, it is beyond the power of a benevolent society to pass such laws as would unreasonably restrict the rights of the parties. But when the benevolent society and the members enter into an express contract, which is clear and concise in its provisions, we submit that this court will not set the same aside, because it may appear unreasonable. A contract of this nature is as sacred as any other contract; and there is nothing to differentiate it from a contract between two individuals, there being no question of public policy involved.

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Opinion of the court.

In *Phillips v. Baltimore Mutual Aid Society,* 6 Pa. S. Ct., 157, cited in 5 General Digest, p. 1082, it is held that "no recovery can be had on an insurance policy providing that any member in arrears for more than three weeks shall not be entitled to benefits, but such member may be reinstated by paying arrears and passing examination, but would not be entitled to benefits, should sickness, accident or death occur within five weeks after reinstatement, when the insured dies within two weeks after a reinstatement." To the same effect are *Alters* v. *Pro. Ass'n* (C. P.), 43 W. N. C., 336, 7 Gen. Dig., 1155; *Dabura* v. *Sociedad De La Union,* 59 S. W. (Texas), 835.

No obligation existed on the part of the appellee to return the money paid in by decedent, because, under the contract between decedent and appellee, if the decedent should continue to to pay dues, then, after the expiration of sixty days, there would be due to decedent a benefit; hence, the consideration has not failed, and the obligation upon appellee has not been shirked in any wise. Moreover, no administration has been taken out upon the estate of the decedent, and until there shall have been an administration, there is no one to whom the appellee could have made payment, even if such obligation existed.

MAYES, J., delivered the opinion of the court.

On the 5th day of October, 1894, Samuel Morgan became a member of the Independent Order of the Sons and Daughters of Jacob of America. This organization is a mutual benefit association. Samuel Morgan was about fifty-eight years old at the time he joined, and was illiterate, unable to read or write, or sign his name. The beneficiaries named in the insurance certificate issued by the order of the Sons and Daughters of Jacob of America at the time he joined the order are the appellants in this case, Lucy Morgan and others. Samuel Morgan was continually a member of this order from the time he joined in 1894 until the day of his death, which occurred on the 15th day of July, 1905, eleven years after he became a member of

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the order. Throughout all this period of time he paid all the obligations of the order required by its rules, and at the time of his death there was nothing due from him to the order; he having paid all dues and assessments up to that time. After the death of Samuel Morgan, the beneficiaries named in the policy of insurance presented same to the order and made demand on it for the sum due them as per the certificate of insurance issued to Samuel Morgan in his lifetime. The Sons and Daughters of Jacob declined to pay the insurance, and denied their liability under the insurance policy, on the ground that at the time of the death of Samuel Morgan he was what is called "nonfinancial"—that is to say, not in good standing with the order,—and therefore the certificate of insurance was void. This claim of nonliability on the part of the order is based upon the fact, as they claim, that by sec. 5 of Art. XI of the by-laws each and every member of a subordinate lodge of the order is required to pay into the treasury of the Supreme or Grand Lodge, located in the territory of his or her membership, a regular monthly advance assessment of $1 on the first day of each month, and they claim that Samuel Morgan did not pay this assessment for June, 1905, on the first day of June, as required by this article of the by-laws. The facts shown by the record, however, are that, while it is true that Morgan did not pay on the first day of June, he did pay, as the receipt shows, on the second day of June, and a receipt was issued to him for this June assessment. At the time he paid this June assessment it was accepted by the scribe of the local lodge to whom it was properly payable, and by him forwarded to the Grand Lodge, and nothing was said to him at the time about this fact rendering him "nonfinancial" in the order, or, in other words, suspended.

The appellee hopes to win this suit upon this solitary fact; that is to say, escape liability because this assessment for June was not paid upon the first day of June, but upon the second day, and therefore, Samuel Morgan, under other by-laws which

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we shall hereafter quote, became suspended from the order, *ipso facto,* without further action on the part of the order, and his beneficiaries were not entitled to recover on this policy. By sec. 1 of Art. IV of the by-laws of the order, it is provided that "a member, by the records of his or her lodge, and by returns to and records of Supreme and Grand Lodge, shown fully and regularly paid on all financial claims of the order, due after date of his or her membership, is, if since his or her joining or renewing or reinstating more than sixty days have elapsed, a financial member of the order." By sec. 2 of Art. VI, "Any member who owes three months' dues, or fails to pay any assessment on or by the date it is due, or fails to pay any Supreme or Grand Lodge tax when due, or fails to pay any fine in thirty days after imposed, or fails to pay any tax of his or her lodge when due, is nonfinancial and suspended from the order." And by sec. 3 of Art. VI, it is provided that "a nonfinancial and suspended member, possessed of the qualifications of a new applicant for membership in the order, personally appearing in a regular meeting of his or her old lodge, paying up in cash all dues, taxes, assessments, fines, and lodge debts held in arrears against him or her, shall, according to limitations under which new members become benefit members, be reinstated to financial membership." The sections under which the order claims exemption from liability for this insurance are sec. 2 of Art. VI and sec. 5 of Art. XI. Section 5 of Art. XI requires the payment, in advance, of $1, on the first day of each month; and sec. 2 of Art. VI provides that any member who fails to pay any assessment on or by the date it is due is nonfinancial and suspended from the order. The contention of appellee is that, because this assessment of $1 for June was paid on the second day of June, instead of the first, Samuel Morgan, by virtue of this section, became "nonfinancial" and suspended from the order, and therefore the insurance policy was vacated. It must be borne in mind, however, that the local scribe accepted this assessment

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on the second, issued his receipt therefor, sent it in to the Grand Lodge, and again a month afterwards accepted another payment, and that no notice was ever given to the insured that these payments were not accepted as a continuation of the insurance, or that the order considered him nonfinancial and suspended. When a member becomes nonfinancial and suspended, the only provision that is made for his reinstatement is by personally appearing in a regular meeting of the lodge, and there paying in cash all debts, etc., in arrears against him, whereupon he is admitted according to the limitations under which new members can become benefit members.

The court cannot overlook the fact that associations of the character now before the court largely deal with the illiterate and ignorant. The by-laws consist of a multiplicity of rules and regulations in volume composing a small book. A correct interpretation of their meaning often puzzles the most astute. Is it, then, a matter of wonder that courts construe their contracts most favorable to the insured? This court has said in *Murphy* v. *Independent Order, etc.*, 77 Miss., 830, 27 South. Rep., 624, 50 L. R. A. 111, that in dealing with these orders there shall be a liberal construction of the by-laws in favor of the insured, so as to prevent a forfeiture, if possible. This is but the announcement of the universal rule upon this subject by all the courts, the rectitude and wisdom of which is made manifest by this record, wherein this order is seeking to invalidate the insurance policy of Samuel Morgan, on which he has paid for eleven years, because the assessment was paid on the second day of June, instead of the first, just one day after the date the by-laws specified that it should be paid. In *Thompson* v. *Knickerbocker Ins. Company,* 104, U. S., 252, 26 L. Ed. 765, in the conclusion of the opinion, the court says: "Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default. We do

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not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely." The principles announced above are repeated in *Hartford Life & Annuity Ins. Co.* v. *Emily Unsell,* 144 U. S., 439, 12 Sup. Ct., 671, 36 L. Ed., 496, and *Phœnix Mutual Life Ins. Co.* v. *Caroline R. Doster et al.,* 166 U. S., 30, 1 Sup. Ct., 18, 27 L. Ed., 65.

Mutual benefit societies are subject to the same rules of law that govern other life insurance companies, except in so far as the rules of law appertaining to other life insurance societies may be lawfully modified by the objects and purposes of the organization of the society. No insurance corporation or society can, by contract or by virtue of its by-laws, exempt itself in advance from liability to estop itself from asserting a forfeiture of a policy of insurance, when there has been a breach of its conditions on the part of the insured and the conduct on its part has been affirmatively such as to induce the belief that the forfeiture has been waived. After the failure of Samuel Morgan to pay the June assessment the day it was due, if the lodge was to treat him as nonfinancial and suspended from the order, it was their duty to decline to receive further assessments from him until he should have been reinstated according to sec. 3 of Art. VI; that is, until he should have personally appeared at a regular meeting of the lodge and paid in cash all dues, taxes, and assessments. If they considered him nonfinancial and suspended, he was a stranger to the order from the date he became so, and they had no right to accept his money under such circumstances as would lead him to believe that he was

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still a financial member of the organization; and, if they did, they are estopped to deny liability on the insurance certificate issued to him, in the absence of the record showing that Morgan was notified that he was nonfinancial and suspended, and that the money was taken only as an application for reinstatement. It is true that under sec. 11 of Art. XI, it is provided that a person, "paying his or her overdue assessment or tax but applies to be reinstated," and that "a receipt given a person for payment of any financial claim of the order shall in no wise waive, or constitute a waiver, of the suspension of such person for nonpayment of any prior financial liability to the order." In other words, by sec. 11 of Art. XI, the order attempts to insert a by-law to relieve it from any act of estoppel under the law. This cannot be tolerated.

It is argued by appellant that sec. 2 of Art. VI of the by-laws, which provides that a member shall be nonfinancial and suspended from the order on failure to pay any tax or assessment when due, is void, because it is harsh, unjust, and unreasonable. We are not called upon to determine this question. It is not essential to a decision of this case. Neither is it necessary for us to decide whether or not this section, *ipso facto,* suspends a member from the order upon failure to pay any assessment or tax upon the day it falls due, because the appellees have estopped themselves to set up any claim under this section for the nonpayment of this tax on the day it was due, for the reason that they have accepted the June payment and the July payment as though there had been no default, and they have continued in every way to treat Samuel Morgan as a financial member, and have not in any way put him on notice that he was suspended. If it be considered that for a violation of sec. 2 of Art. VI, a member is *ipso facto* suspended from the order, it follows that the order from that time on must decline to receive his dues, except in the way provided in sec. 3, of the same article of the by-laws; that is, by requiring him to personally appear at a regular meeting of the lodge and pay

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all dues, etc. If it be considered that by sec. 2 aforesaid, a member is *ipso facto* suspended, and that no other notice to him is necessary, it still follows that where that member is continued in the belief that he is a member in good standing, and offers his dues to the lodge, which are accepted by it, if they intend to treat it as an application for reinstatement under sec. 11 of Art. XI, it then requires some affirmative action on the part of the order, and they must notify the member paying the tax or assessment that they accept it only under the conditions imposed by sec. 11 of Art. XI; that is to say, merely as an application for reinstatement.

Mutual benefit orders can be estopped by their contract just as private individuals are estopped. Any clause in any order which contracts against the effect of acts on their part which would create an estoppel on the part of individuals is in contravention of the law and void. For eleven years Samuel Morgan had paid his dues, and the only claim of exemption from liability by the order is that towards the close of his life, instead of paying on the first day of June, he paid on the second day of June. We can imagine no more technical defense issuing from an order, the declared purposes of which are to promote benevolence, establish benefit funds, and render aid to the needy, sick, and distressed member, than the defense which is sought in this case. If the order seeks to avoid its liability by requiring of its members technical exactness in the payment of their dues, this court will exact of it technical exactness in its moral duties towards its membership, to the end that none may be misled in supposing that they are laying by something for the dependent ones left, when the hand that has earned the money wherewith to pay the dues to the lodge is cold and still. Forfeitures are hateful to the court. This court will never avoid an insurance policy, acted upon in good faith by the insured, where the dues have all been paid and the company is in no way prejudiced by any act of the insured, unless it be in the clearest case of a violation of good faith with the insurance company. *Reversed and remanded.*

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Brief for appellant.

STATE OF MISSISSIPPI EX REL. JACOB W. BARBEE v. JAMES N. BROWN ET AL.

[44 South., 769.]

PRIMARY ELECTIONS. *Contests. Judicial review. Mandamus. Recounts. Jurisdiction.*

The circuit court has no jurisdiction of a suit:—

(*a*) To contest the result of a political party primary election; nor by mandamus.

(*b*) To compel the executive committee of a political party to recanvass the votes cast at such an election.

FROM the circuit court of De Soto county.

HON. SAMUEL C. COOK, Judge.

The state, suing on the relation of Barbee, appellant, was plaintiff in the court below; Brown and others, appellees, were defendants there. The suit was for a mandamus, and from a judgment sustaining a demurrer to the petition and dismissing the suit the plaintiff appealed to the supreme court.

The relator, Barbee, and one Lauderdale, were rival candidates in the Democratic primary election for the nomination for sheriff. The county Democratic executive committee canvassed the returns and declared Lauderdale the party nominee. The relator filed his petition in the circuit court, making as parties defendant Brown and the other members of the executive committee. The petition set out certain irregularities and frauds alleged to have been practiced at Love precinct, and prayed that the committee reassemble, and hear evidence, and investigate the true results of the ballots cast at Love precinct, and declare the result.

Julian C. Wilson and *R. L. Dabney,* for appellant.

The remedy here sought is a mandamus to require the legally

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established authorities of a political party to do what was requisite upon them in law. That mandamus should lie is evident. Code 1906, § 3231, provides that "the writ of mandamus shall be issued by the circuit court, commanding any inferior tribunal, corporation board, officer, or person to do or not to do an act, the performance or omission of which the law specially enjoins, as a duty resulting from an office, trust or station, where there is not a plain, adequate and speedy remedy in the ordinary course of law."

Is the character of a political executive committee, working under our statute law, such that mandamus is applicable in any event? Formerly the Democratic executive committee was the supreme tribunal of the Democratic party in Mississippi, determining when and how and by whom nominations should be made; and it met when it chose to meet. The legislature of 1902 stripped from it the selection of the method and time, as well as the determination of participants in party elections; practically the only power left being the ministerial one now provided, and the judicial function of settling all controversies. Laws 1902, secs. 14, 110. Under this state of affairs the case of *Brewer* v. *Abbay,* 82 Miss., 559, was decided by this court. A change was made by the Code of 1906, the legislature showing a manifest intent to give no more functions to the executive committee than to the county election commission. It had ceased to be a legislative body by the passage of the Laws of 1902; and, as a result of the adoption of the Code of 1906, it ceased to be a judicial or *quasi*-judicial body, and its members became merely ministerial officers, having slightly more than the duties of county election commissioners. This is apparent from a consideration of Code 1906, § 3705, prescribing the duties of the executive committee; and Code 1906, § 4178, prescribing the duties of the county election commissioners.

From the foregoing it is apparent that it is the duty of the executive committee to comply with the law that limited it,

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Brief for appellant.

and continued it in force; that is to say, its duty is to receive and canvass returns, declare the result of the vote, and announce the name of the party nominee. The committee has no right to canvass anything but the returns. *Oglesby* v. *Sigman,* 58 Miss., 510. The returns mentioned in the statute merely consist of the papers announcing the result in the different precincts and certified to by the different precinct officers.

As the executive committee received and canvassed a set of returns from Love precinct, which were not properly certified to, and did so after challenge by friends of the relator, Barbee, the committee exceeded its authority. It should have declared the result of the primary election solely from the returns which were regularly sent in; but it failed to do so. We submit, that as the committee failed to perform its duty, it should be compelled to do so; and that mandamus will lie to compel it so to do.

Even if the functions of the executive committee be claimed to be *quasi*-judicial under the statute, we submit, that it had notice to put it on inquiry before counting the returns from Love precinct; and its action was arbitrary, and an abuse of discretion. The rule seems to be clear that a mandamus will never issue to control a discretion, but will issue when there is a fixed duty which should be performed. When an officer or tribunal arbitrarily, or from a mistake as to procedure or power, refuses to go into the merits of controversy about which such officer or tribunal has no discretion, mandamus will issue to require an investigation of the merits. High's Extraordinary Legal Remedies, sec. 151; *Sullivan* v. *Railroad Co.,* 85 Miss., 660; *Ex parte Bradstreet,* 7 Peters, 634, 30 L. Ed., 577; *Ex parte Parker,* 120 U. S., 737, 30 L. Ed., 818; *State v. Taylor,* 104 S. W. Rep., 242.

Although the executive committee must determine for itself what are the returns, its acts are ministerial, and it must get the right returns. *McWhorter* v. *Donald,* 39 Miss., 79; *Chears* v. *Chears,* 81 Miss.; 662; *Chalmers* v. *Myers,* 60 Miss., 766.

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Brief for appellee.

We submit, that the authorities are overwhelming to support the issuance of the writ of mandamus in a case such as this. 15 Cyc., 382; 10 Am. & Eng. Ency. of Law, 2 ed., 808; *State* v. *Garesch,* 65 Mo., 480; McCreary on Elections, 412; *State* v. *McFadden,* 46 Neb., 668; *People* v. *Canvassers* (N. Y.), 29 N. E. Rep., 327, 14 L. R. A., 624; *People* v. *Canvassers* (N. Y.), 29 N. E. Rep., 14 L. R. A., 643; *Smith* v. *Lawrence* (S. D.), 2 S. D., 185, 49 N. W. Rep., 8; *Morris* v. *Glover* (Ga.), 49 S. E. Rep., 786; *State* v. *Board,* 38 Kan., 436, 17 Pac. Rep., 304.

In conclusion, we submit, that the duty of the executive committee is a trust for the benefit of the electors at large, and mandamus should lie; as there is no remedy by injunction. *Ex parte Wimberly,* 57 Miss., 437; *Gibbs v. McIntosh,* 78 Miss., 648, 29 South. Rep., 465.

Calvin Perkins, for appellee.

A primary election, under the chapter of the Code on that subject, consists of two parts, two elections, "the first primary" and "the second primary." The first primary may or may not be final as to a nomination; its finality depending on whether or not any candidate shall receive thereat a majority of the popular vote. But the second primary is final in all cases.

It must have occurred to the legislature in making provision for the two primaries, that in the practical application of the primary election law many instances would arise where the first primary would be a finality, because of the large percentage of instances in which the first primary would be final, and because, also, of its forming the *foundation* for the second primary, the lawmakers must reasonably have regarded the first primary as of equal importance with the second. If the legislature intended that the circuit courts should, by reason of a petition for mandamus, exercise supervisory control over the second primary, it must have intended that there should be like supervision as to the first primary.

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Brief for appellee.

If the legislature never intended that any tribunal, judicial or otherwise, save only the governing bodies of the respective political parties, the respective executive committees, should be vested with jurisdiction to determine the result of the first primary, it thereupon follows that the legislature so intended as to the second primary and if the legislature had intended that the courts should be open to hear the complaints of those candidates dissatisfied with the result of the first primary as declared by the executive committee, would it not have provided for a "contest," or would it not at least have fixed such an interval of time between the dates of the two primaries as would have been reasonably sufficient to institute, conduct and complete a trial in court?

The language of Code 1906, § 3700, is, "the second primary shall be held three weeks after the first primary"; neither more nor less than *three weeks.* There is no other provision on the subject. If the legislature intended court supervision in the premises, and intended to let the interval between the primaries remain at three weeks, would it not then have at least cut off the right of appeal and the right to new trials, and have made the decision of the circuit court a finality without new trials or appeals?

Let us suppose, as the appellant contends, that the legislature intended to confer upon the courts the power by mandamus to supervise and control the constituted authorities of political parties for determining the candidates for party offices, the law being as it is unchanged with regard to trials of issues of law and trials of issues of fact, new trials, appeals, reversals and other trials. Let us then see how such things could be managed in the court during the interval between the first and second primary. In the case of county offices, at least one day of that time would be consumed by the committee in "canvassing the returns and declaring the result," another day by the claimant in preparing his complaint, and then the other claimant, or whomsoever might be made defendant, would have to

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receive five days' notice, thus leaving less than two weeks of the limited three weeks' time for the determination of the various issues of law and of fact, and appeals, reversals and other trials. And there might be issues of fact with regard to every precinct in the county.

Prior to the enactment of the statute relating to primary elections the question presented by this controversy would have been a political one, pure and simple; such questions are without the jurisdiction of the courts. It is unnecessary to cite the numerous decisions of the supreme court of the United States to the effect that the courts have no authority to inquire into or control political matters. It is equally true that the primary election law of 1902 (Acts of 1902, p. 105) left such questions where it found them, *i. e.,* to the machinery of the respective political parties, subject to the final determination of the people at the polls; regulated, however, to a certain limited extent as provided in that act. The Act of 1902, sec. 14, p. 110, in specifying that the county executive committees should have power to hear evidence, investigate and finally determine wrongs, did in so far as it went, but confirm a power which had resided in such committees from the organization of this government. It also narrowed the powers of the governing bodies of political parties, in so far as it undertook to provide *what* evidence should be received, as that the witnesses should be heard "orally under oath or by affidavits" and, to that extent, was in derogation of the powers previously exercised by such bodies. But because the Code of 1906 has omitted from the primary election law said sec. 14, and thereby repealed it, it is plausibly argued by appellant that the power of final determination in the premises has been taken away from the executive committees and thereby conferred upon the courts. Code 1906, § 3697, is, word for word, the same as sec. 1 of said Act of 1902, with the following words at the end of sec. 3697, not in said sec. 1 at all, to-wit: "Except as specially modified or otherwise provided in this chapter," relating solely

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to the indictment and punishment for offenses committed in holding primary elections. Code 1906, § 3705, is, word for word, the same as the Act of 1902, sec. 6 of said Acts of 1902. The statutory provision relative to canvassing the returns contained in said sec. 3705 is as follows: "The county executive committee shall meet on the first or second day after each primary election; shall receive and canvass the returns, which must be made within the time fixed by law for returns of general elections, and declare the result, announce the names of the nominees for county and county district offices, and the names of those candidates to be submitted to the second primary."

It is a familiar principle of law that upon the repeal of a statute superseding the common law rule previously applicable, the rule is revived. "Where an act superseding any particular common law rule previously applicable is repealed, that rule is held to be revived." Endlich on Interp. Stats., p. 678.

And so it seems by analogy, that the repeal of said section 14, which partly confirmed and partly restricted the powers previously exercised by the governing bodies of political parties, had the effect to restore such powers as they existed previous to the enactment of the repealed statute.

Since the recent decision of this court in *Ramey* v. *Woodward,* 44 South. Rep., 769, settling the question as to contests between rival candidates against the contention of appellant, we assume that the appellant now relies solely upon Code 1906, § 3231, relative to the alleged remedy by mandamus. So far as we have been able to ascertain, mandamus as a statutory remedy made its appearance in this state for the first time in Code 1871, § 1517, which was amended by the Act of 1876 (p. 56), so as to require the clerk to issue a summons and to dispense with the alternative writ and make the petition stand in lieu of such alternative writ. Section 2542 of the Code of 1880 and § 2846 of the Code of 1892 are word for word the same as said § 3231 of the Code of 1906, and it will be

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observed that § 1517 of the Code of 1871 includes language which is identical with that of the three subsequent codes.

In none of the said statutes on mandamus is there any specific mention of primary elections nor of general elections.

Paraphrasing and combining the language of Justice CAMPBELL in *Vicksburg* v. *Lowry,* 61 Miss., 102, and of Justice MAYES in *Ramey* v. *Woodward, supra,* and applying the same to the subject matter under consideration, we say that if the courts go so far as to undertake, by mandamus or otherwise, to determine for a particular party which candidate shall be declared its nominee, they would be taking into their hands powers which the people, by the action of their representatives, decided to intrust to the constituted authorities of the respective political parties, and which the people intended should be reviewable only by the votes of the electors at the polls.

Ramey v. *Woodward, supra,* establishes that the county executive committee is a *juasi*-judicial tribunal vested with large discretionary powers. The authorities in this state and elsewhere are uniform that such discretion cannot be controlled by mandamus. In *Brewer* v. *Abbay,* 82 Miss., 566, Chief Justice WHITFIELD says, "plainly this would be to employ the writ of mandamus not to compel action but to control discretion in acting." To the same effect is *Shotwell* v. *Covington,* 69 Miss., 735, where it was decided that judicial acts however "corrupt or arbitrary" may not be revised by mandamus.

If it should be said that the appellant is entitled to mandamus to *compel* the executive committee to act, the complete answer is that the petition shows that the committee had acted.

MAYES, J., delivered the opinion of the court.

In the case of *Ramey v. Woodward* (recently decided by this court), *Ante,* 777, 44 South., 769, it was held that there was no provision in the law for the courts to entertain contests between rival candidates in primary elections for the purpose of determining which shall be declared the nominee of the party.

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Though the form of the proceeding instituted here is that of mandamus, its real purpose and effect, if sustained, is to procure the court to entertain a contest between rival candidates in a primary election for the office of sheriff, to determine which shall be declared the nominee of the party. We have heretofore held that the courts were without power under the law to entertain these contests in whatever form they may arise. This power is confided to the executive committee of the party, and there is no appeal from their decision save to the people themselves.

The essential featurs of this case are not different from the case of *Brewer* v. *Abbay,* in 82 Miss., 559, 35 South., 153. The petition here shows that the executive committee has acted and declared a person other than petitioner the nominee of the party, but it is alleged, as a ground for invoking the aid of the court, "that it did not receive, count, and canvass the returns from Love precinct, but, on the contrary, did receive, count, and canvass only spurious and pretended returns, not made or certified by the managers and clerks, but substituted and imposed upon the committee; that, on its attention being called to it, it declined to investigate or hear evidence of this fact, but proceeded unlawfully to change the result, really receiving a mere sham for returns; that this reception and canvass of the returns was a condition precedent of the declaration of the result and an announcement of the name of the nominee; that, notwithstanding that, they failed to receive and canvass the returns from Love precinct, but the said committee did add fifty-seven votes not shown by the return to the votes of E. D. Lauderdale, in the manner before described, thereby increasing the number counted for him to five more votes than they counted for said J. W. Barbee, whereupon they illegally and improperly declared E. D. Lauderdale nominee for said office of sheriff, and announced his name as the nominee of the party therefor." The ground upon which is based this petition, as shown by the petition itself, is not that the executive committee had refused to act; but the complaint is that they have acted and counted

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illegal votes, and the purpose of this petition is to procure the court, by mandamus, to reassemble the committee for the purpose of a recount and an elimination from the count of the votes claimed to be fraudulent. The executive committee, the constituted authority of the party, is the sole arbiter of this question. If the facts alleged in this petition are true, deplorable as it is, the party must be allowed to correct these evils in so far as the party is concerned, and the criminal laws can be appealed to to punish the wrongdoers; but there is no power in the courts to correct it by means of its civil process, in so far as to command a reassembling of the committee for the purpose of having a recount of the votes. The very prayer of this petition is "that the court issue a writ of mandamus directing said Democratic executive committee to reassemble, and disregard and throw out the alleged false and spurious returns and ballots from Love precinct, and disregard same, and to canvass, count, and declare the result, independent of and without such false returns and ballots, and announce the name of the nominee in accordance with the returns and ballots, or, in the event that the true returns can be ascertained and the true ballots known, after throwing out the false and spurious returns and ballots to receive, count, and canvass the true returns from Love precinct, in said county, and declare the result, and announce the nominee in accordance therewith." It will thus be seen that this writ is appealed to for the purpose of procuring the court to have the executive committee reassemble, after having once assembled and declared the nominee, and throw out certain votes claimed to be illegal, and to again, after having acted once, declare another nominee for the party. The courts are without power to do this.

We do not decide whether the executive committee had the power to reassemble and make a new count, after having once canvassed the returns, declared the nominee, and adjourned, as it is not necessary to a decision of this case; but certain it is that, if they possess this power to reassemble, it is one of dis-

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cretion vested in them, and is not subject to control by any court. The only distinction presented between the facts of this case and the *Brewer case* is that in this case the petition alleges that the petitioner did not know of the facts at the time, nor had he an opportunity of knowing. This might be a strong reason to be addressed to the executive committee as a reason why they should, in their discretion, reassemble and recount the votes; but there is no such differentiation in the facts of this case from the facts of the *Brewer case* as would vest the court with power to act. It is true, in the *Brewer case,* it is shown that the petitioner therein knew all the facts at the time of the meeting of the executive committee, and offered no objection or evidence before the committee to prove them; but the case does not turn upon the question of whether or not, knowing all the facts, he failed to object, and therefore was estopped from afterwards contesting them, but it holds that the petition, as is the case here, was for the purpose of having the executive committee reconvene and recount the votes, which the court held was beyond the power of the court. The court further says: "In the case of a primary election, there is no tribunal vested with the power to determine who is to be the party nominee, to correct the wrongs and frauds bearing upon the solution of that question, save only the executive committee of the county." We repeat here this excerpt from that opinion as being the law of this case.

Affirmed.

WHITFIELD, C. J., delivered the following specially concurring opinion:

I wish to add just one other view which, as it seems to me, greatly strengthens our conclusion as announced in the opinion in chief. That view is that the opposite construction practically nullifies the primary election law. If the courts have jurisdiction to hear a mandamus to compel the county executive committee to reconvene and recanvass the returns, in the case,

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Concerning opinion.

not only of election cases, but of a simple primary nomination, then it must result that an appeal could lie to this court, and on reversal there could be another trial below, and a second appeal to this court, and so on. Only three weeks are allowed between the two primary elections, and when the other particulars, as to within what short time this canvass is to be made and the result declared by the executive committee, are considered, it must be perfectly obvious that the day for electing the officer will long have passed before there shall have been, on the opposite view, a mere declaration of who the nominee is. The scheme of the legislature in this matter seems to have been to repose confidence somewhere as to the honesty and purity of nominating primaries, and to repose that confidence in the executive committees of the counties, districts, and state. It was assumed that responsibility to the party would be enough to secure common honesty and common fairness on the part of the various election officers, and of the executive committees of the counties, districts, and state. A violation, on the part of any of these officers, of any of the provisions of the primary election law, subjects them to punishment as provided by that law; but there is no provision in the primary election law, since the repeal by the legislature of 1906, of sec. 14, ch. 66, p. 110, of the Laws 1902, for an appeal to the courts to correct any of the evils upon the nominating primaries.

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Statement of the case.

JOHN W. TAYLOR v. CHRISTOPHER C. BARBOUR ET AL.

1. BROKERS. *Contracts. Commissions. Recovery. Unilateral agreements.*

A promise by the owner of property to pay a broker a commission on its sale when made by either of them is unilateral; and if the owner effects the sale the broker cannot recover commissions; but if the broker effects the sale his commissions are recoverable.

2. SAME. *Consideration.*

If in such case the owner make the sale by the aid of the broker, such aid will constitute a consideration and entitle the broker to recover his commissions.

FROM the circuit court of Alcorn county.

HON. EUGENE O. SYKES, Judge.

Barbour and others, partners, doing business under the firm name Barbour & Company, appellees, were the plaintiffs in the court below, and Taylor, the appellant, defendant there. From a judgment in plaintiffs' favor the defendant appealed to the supreme court.

The plaintiffs, Barbour & Company, instituted two different suits before a justice of the peace against appellant, one to recover $60 as commission for sale by plaintiffs, as brokers, of $24,000 of Corinth Waterworks bonds, the other to recover $125, as commission for sale by plaintiffs, as brokers, of $70,000 of Gulf Compress bonds. Judgments by default were rendered in the justice's court in the two cases against the defendant, Taylor, from which he appealed to the circuit court, where the two cases were consolidated.

The contract, the basis of the suits, is found in certain letters written by Taylor to Barbour & Company, which, omitting formal parts, are as follows:

"Yours of the 15th received. The party with whom we

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Statement of the case.

thought we had placed the bonds did not take them, so you may still try to place them. If we should place them before you do, we will allow you the commission on them just the same as if you had sold them, which we understood to be one-eighth of one per cent, if we are not mistaken. There should be no trouble in placing these bonds, so please make your best endeavors to get the very best price possible. We want to be in position to make sale of them, if we can, although you will have them for sale yourself. If you get an offer, please advise us at once."

"Yours Dec. 1st rec'd. We would not want to discount the Gulf Compress Co. notes any at all, as they are A No. 1 securities. They are amply secured by the property, and in addition I am perfectly willing to indorse every one of the notes. The Gulf Compress Co. are getting control of most of the presses in the South, and we regard the paper as gilt-edge. We are perfectly willing to pay you your brokerage of one-fourth of one per cent, and might allow a small discount on the notes, but to make it net party eight per cent would require a loss of about $15,000."

"Inclosed please find check for $50 on a/c expenses entailed by you in assisting me to dispose of the Gulf Compress Co. notes. I will send you check for balance soon, as we are using all our funds now. I do not see why you looked at this matter the way you did, as you did not have any option on the notes. I wish to do what is right with you, however. I have at present $100,000 Como Compress Co. bonds for sale. Bonds bear six per cent and are due in twenty years. If you have any customers who would be interested, advise me, and maybe you can place some of them for me."

The defendant offered no evidence. Under peremptory instruction, the jury returned a verdict in plaintiffs' favor for $185, the total of the two demands against defendant, together with interest.

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Brief for appellant.

J. M. Boone, for appellant.

The sole issue here is, whether the contract sued on was unilateral and supported by no consideration moving from appellees to appellant. The case is controlled by *Kolb* v. *Land Company,* 74 Miss., 568. It will be seen that Barbour & Company, the appellees, admitted that they did not sell the bonds or the notes; and there was no evidence showing that they assisted in any way in effecting the real sale of the bonds or the notes. They based their right to recover, upon the statement of appellant that he would pay them their commission whether they sold the bonds and notes or not. Appellees paid no consideration, entered into no correlative obligation, and, if they had taken no steps whatever in executing the purposes of agency, they would have incurred no liability to appellant; and appellant could not have sued them for nonperformance of the contract. Appellees did not present any purchaser, ready and willing to buy. The circumstances here are practically the same as in the case of *Kolb* v. *Land Company, supra.* See also *Stensguard* v. *Smith,* 43 Minn., 11, 4 Am. & Eng. Ency. of Law (2d ed.), 967; *Sibbald* v. *Bethlehem Iron Co.,* 38 Atl. Rep., 441.

The court below seemed to be impressed with the idea that the appellant was liable to appellees because he promised to pay the commissions whether the appellees effected the sale of the bonds and notes or not. But such promise was clearly without any consideration, and no authority can be found to authorize its enforcement. Lawson on Contracts, sec. 100; *Hendricks* v. *Robertson,* 56 Miss., 699.

The lower court permitted recovery on the express contract of appellant to pay appellees, whether appellees sold the bonds and notes or not. Recovery was not permitted on *quantum meruit,* nor on a claim for expenses incurred, but, as stated, on express contract, the court holding that appellees should be allowed to recover for services not rendered, by reason of the fact that

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appellant had promised appellees that he would pay them commissions whether they sold the bonds or not.

We call the court's attention to the fact that appellant, according to the testimony of appellees, never admitted that appellees assisted in the sale of the $24,000 Corinth Waterworks bonds, hence appellees were not entitled to recovery of commissions on this account.

Lamb & Johnston, for appellees.

It will be seen, that appellant does not deny the contract as detailed by the testimony of appellees. In fact, the letters in evidence of appellant confirm the testimony and contentions of appellees.

We do not agree with the learned counsel for the appellant, that this case is controlled by *Kolb v. Land Company,* 74 Miss., 568; because the appellant, Taylor, states in his letters that the appellees, Barbour & Company, assisted in selling the notes and bonds, and paid appellees part of their commission for so doing, and promised to pay the balance. The contract was not unconscionable, was clearly understood by the parties thereto, and appellees lived up to the very letter of their part of the contract.

The learned counsel for appellant present their case on the theory that nothing was done by appellees after the contract was made. It is shown, however, as against this, that appellees went to work at once to dispose of the bonds and notes, and appellant admits their assistance in disposing of them. The service performed by appellees was a valid consideration. 6 Am. & Eng. Ency. of Law (2d ed.), 719.

The rule is well established, that in bi-lateral contracts the promise of each of the parties is a sufficient consideration for the promise for the others. 6 Am. & Eng. Ency. of Law (2d ed.), 727. As the performance of the contract by appellees constituted a valid consideration, and the consideration was executed, the contract became enforceable. Hence, appellees are

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clearly entitled to the commission of one-fourth of one per-centum for the sale of the Gulf Compress Company notes. 6 Am. & Eng. Ency. of Law (2d ed.), 970; *Stringfellow* v. *Elsea* (Tex.), 45 S. W. Rep., 418.

The case of *Hendricks* v. *Robertson,* 56 Miss., 699, cited by appellant, cannot have any application to this case, for the governing feature in the case cited, was the statute of frauds. We submit that the case of *Hoskins* v. *Fogg,* 60 N. H., 402, sustains the contentions of the appellees in this case.

MAYES, J., delivered the opinion of the court.

If there were nothing in this record except the promise of Taylor to allow Barbour & Co. a commission of one-quarter of one per cent on the sale of the bonds in question, whether the sale was effected by Taylor or Barbour & Co., and the sale, in point of fact, had been made by Taylor, the agreement would be unilateral and have no binding force on him, and would fall directly within the rule laid down in the case of *Kolb* v. *Land Co.,* 74 Miss., 567, 21 South., 233. Even under this agreement, if the sale had actually been accomplished by Barbour & Co., they would have been entitled to their commission, even though the agreement was unilateral and could have no binding force until executed by Barbour & Co. In the letter written by Taylor to Barbour & Co. on June 22, 1906, he acknowledges that they (Barbour & Co.), assisted him in disposing of the Gulf Compress Company notes. This being the case, after the performance of the contract by Barbour & Co., this performance by them constituted a valid consideration for the contract. The consideration being executed, the contract became enforceable. Therefore they are clearly entitled to the one-fourth of one per cent commission for the sale of these notes, and the judgment as to the $125 is affirmed.

The case is different as to the $24,000 Corinth Waterworks bonds. The promise to allow commissions on the sale of these bonds never proceeded beyond a unilateral agreement, and

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Statement of the case.

there is no admission by Taylor that Barbour & Co. assisted in the sale of these bonds. Therefore there can be no recovery of commissions on this amount. Hence the judgment for $60 was improper, and as to this the case must be reversed and remanded, and the costs taxed in equal proportion against appellant and appellee.

BROTHERHOOD LOCOMOTIVE FIREMEN v. SARAH C. HAND ET AL.

[44 South., 161.]

INSURANCE. *Contracts. Benefit association. Application rejected.*

A contract cannot be predicated of an application to a benefit association for life insurance by one who failed to comply with the regulations of the order and whose application was not passed upon by the medical examiner of the association until after the applicant's death, and then rejected.

FROM the chancery court of Lauderdale county.

HON. JAMES L. MCCASKILL, Chancellor.

Mrs. Hand and another, the appellees, were complainants in the court below; the Brotherhood of Locomotive Firemen and certain officers of a subordinate lodge, appellants, were defendants there. From a decree in favor of the complainants the defendants appealed to the supreme court.

The appellees, the mother and father of Vinton M. Hand, deceased, brought this suit to recover $1,500 life insurance on the life of their deceased son, which they claimed to be due them from the defendants. The said Vinton M. Hand, some few months before his death, made application to the local lodge of the Brotherhood for membership therein and for a certificate of insurance in the beneficiary fund of the order on his life, which was referred to a committee of investigation appointed by the local lodge to examine into his qualifications, which committee passed favorably upon it. Subsequently

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Statement of the case.

Hand made application for a beneficiary certificate of insurance, using a form called in the pleadings and evidence, a white form, which the lodge claimed was obsolete, but which was received by the grand lodge, and the application referred to the grand medical examiner whose approval, according to the rules and regulations of the order, is a condition precedent to any right to participate in the beneficiary fund of the order. While the application was still in the hands of the grand lodge, and before the grand medical examiner had acted upon the application, Hand died. Subsequently this suit was begun and the bill of complaint charged "that the said Vinton M. Hand, possessing all the qualifications for membership in said association, and having made out his application in accordance with the constitution of said association, and the same having been forwarded to the grand medical examiner, it thereupon became the duty of the said grand medical examiner to pass upon the said application and approve the same; but the said grand medical examiner in violation of his said duty, as fixed by sec. 35 of the constitution of the order, failed and neglected to discharge said duty, and failed and neglected to pass upon said application for a certificate in said beneficiary department. . . . that the application of the said Vinton M. Hand was not passed upon or disapproved until after the death of the said Vinton M. Hand, and that the excuse on which said grand medical examiner pretended to disapprove was that said application was made out on a white form, instead of on a blue form; but the application was made out in compliance with the requirements of said constitution, and it was immaterial what color of paper the application was written upon, and other members of said association who joined the same at the same time, and before and after the said Vinton M. Hand, made out their applications upon the same forms as did the said Vinton M. Hand, and received their beneficiary certificates, and the said Vinton M. Hand made out said application upon the forms furnished to him by the defendant; and

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Brief for appellant.

the action of the said medical examiner in disapproving said application after the death of the said Vinton M. Hand, was arbitrary, illegal, and contrary to the constitution and laws of said association, and said association is indebted to the complainant in the sum of $1,500 and interest thereon."

The evidence further showed that the local lodge took charge of the funeral of the deceased, burying him according to the rites of the order.

G. Q. Hall, Hall & Jacobson, for appellant.

The Brotherhood of Locomotive Firemen is a labor organization, operating under clearly defined rules and regulations; and the mode of attaining to membership in the order, and of securing a beneficiary certificate of life insurance therein, is solely through the method prescribed by the rules of the order. An applicant for beneficiary certificate of life insurance is obligated, in writing, "to comply with all the laws, usages and regulations of the order as the condition upon which he shall be entitled to participate in the beneficiary department." Each applicant for such certificate is furnished with a copy of the constitution and by-laws of the order, in order that he may be informed as to its laws and regulations. A local medical examiner is provided for each subordinate lodge of the order, his duties being "to make personal examination of all applicants for membership, on forms prescribed by the grand lodge, and to perform such other duties as the laws, rules and regulations of the order require." In addition to the examination of the applicant for life insurance by such local medical examiner, there must subsequently be an approval of the application by an officer of the grand lodge, to-wit, the grand medical examiner, whose duty is "to examine all applications for beneficiary certificates, and to pass promptly upon the same." And it is expressly provided by the rules and regulations of the order that "neither the applicant nor any beneficiary whom he may designate, shall be entitled to participate

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in the beneficiary department, nor in any other fund of the Brotherhood, until the grand medical examiner shall have examined and approved the medical certificate of the local medical examiner; and in the event that the grand medical examiner, who shall be the sole judge thereof, does not approve, but on the contrary, disapproves a medical certificate, then such member shall be classed as a nonbeneficiary member, and entitled to the rights, privileges and benefits of the order, except those participating in the beneficiary department."

Appellees' bill admits that no beneficiary certificate was ever issued on the life of decedent; and further, that the grand medical examiner's approval of the medical certificate was never had. The bill merely recites that "the grand medical examiner, in violation of his duty, failed and neglected to discharge said duty, and failed and neglected to pass upon the application for a certificate in the beneficiary department." The facts constituting such alleged neglect of duty on the part of the grand medical examiner, are subsequently recited in the bill as follows: "The excuse on which the grand medical examiner pretended to disapprove the application, was that the application was made out on a white form, instead of on a blue form." In other words, the bill admits that the decedent made application for beneficiary certificate on an obsolete form, known as the "white form," instead of on a printed form of application required by the order, and known as the "blue form." The evidence shows that there was a material difference in the conditions and stipulations of these two forms of application, and because of the necessity of more complete knowledge of the mental and physical conditions of applicants, the white form, used by the order in the early part of its existence, was superseded by the more complete blue form; and the blue form alone was in legal use when the decedent made his application.

If no contract of insurance was effected, then, of course, the appellees have no standing in court. *New York Life Ins. Co.* v. *McIntosh,* 41 South. Rep., 381; 19 Am. & Eng. Ency, of

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Brief for appellant.

Law, p. 45, note 2, and p. 51; *Tufts* v. *Greenwald,* 66 Miss., 361.

Opposing counsel contended that the appellant was estopped to deny the existence of the alleged contract of insurance, because of appellant's acceptance of application fee from V. M. Hand. Our answer to this is, that evidence shows that the dues and fee of the initiation, independent of assessments for the beneficiary fund, amounted to $7.50, of which a part accompanied the application for membership. And that such amount as was paid by Hand, was by the master of the local lodge turned over to the treasurer of the local lodge, and was by him subsequently repaid to Hand, upon Hand's request, and after Hand had failed to procure the approval by the grand medical examiner of his beneficiary application. In any event, however, the fact that such payment was made to some officer of the local lodge, would create no liability against the beneficiary fund, because no assessment was ever made against Hand by the grand lodge, nor was his name on the list of beneficiary members, nor could Hand, nor any of the officers of the local lodge create any liability against the fund by such payment, for the reason that nothing was owing from Hand to the order on beneficiary dues, under the rules of the order, until approval should be made of his application by the grand medical examiner.

Liability could not arise against the beneficiary fund upon any principle of estoppel, because nonliability is written on the very face of the application for beneficiary certificate in these words: "I understand that until this application is approved by the grand medical examiner, I am not required to pay any beneficiary assessments, nor advance any sum of money for that purpose." Under the circumstances, there could be no liability upon the appellant by virtue of any acts of the members of the local lodge. *Sovereign Camp Woodmen of the World* v. *Dismukes,* 38 South. Rep., 351.

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Brief for appellees.

Witherspoon & Witherspoon, for appellees.

We submit, that the appellant is estopped to deny the existence of a contract of insurance between itself and the decedent, V. M. Hand; (a) because of the acceptance of, and subsequent failure to return, his application fee of $2, and by its acceptance and retention of his initiation fees and beneficiary dues, the appellant all the while knowing that Hand was paying such amounts in the belief that he was securing insurance on his life; (b) and because of the fraud of the secretary and treasurer of the local lodge in preventing the approval of Hand's application, and the issuance of a beneficiary certificate. *Burlington Association* v. *White,* 43 A. State Rep., 701; *Mechanics, etc., Ins. Co.* v. *Smith,* 79 Miss., 142; *Mitchell* v. *Ins. Co.,* 72 Miss., 53; *Assurance Co.* v. *Phelps,* 77 Miss., 625.

As regards the contention that the application was not properly made out, because a white form for application was used, instead of a blue form, we submit, that there was evidence to show that the application which was used by the decedent, was given him by the secretary and treasurer of the lodge of which decedent sought to become a member; and was, moreover, given in the actual presence of the master of the lodge. It is true, that the secretary and treasurer of the lodge testified that after Hand's application on the white form had been rejected, he made repeated demands on Hand to make out his application on a blue form, and that he testified that Hand refused or neglected to do so. But if such were so, it would appear that it should have been obligatory on the secretary and treasurer, under the circumstances, to write to the grand medical examiner, and explain to him that he was doing all he could to get Hand to fill out one of these blue forms.

The money paid into the lodge by the deceased has never to this day been returned to the appellee. Inasmuch as the decedent made an application for membership which was accepted by the proper officers of the local lodge, and his applica-

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tion fees were received by the lodge, and the appellant failed either to issue him a nonbeneficiary certificate, or to disapprove his application before his death, it would seem inequitable in the appellant to contend that there was no insurance. The issuance of a policy is not necessary to complete a contract of insurance. *Jacobs* v. *Ins. Co.*, 71 Miss., 658; *Bishop* v. *Grand Lodge*, 20 N. E. Rep., 552; *Dorchester* v. *Supreme Lodge Knights of Honor*, 40 N. W. Rep., 545; *Van Dyke* v. *Ins. Co.*, 5 N. W. Rep., 236. The offer of insurance, and its acceptance, complete the contract. *Insurance Co.* v. *Herron*, 56 Miss., 643.

As regards the contention of appellant, that the grand medical examiner did not approve the form of application made, we submit, that the arbitrary failure of the grand medical examiner to approve the application, should not preclude the appellee from recovering the insurance. "Equity will consider that as done, which should have been done," and will consider the medical examination approved, if, under the circumstances, it should have been. *Oliver* v. *American Legion of Honor* (Calif.), 17 Am. Law. Rep., 301; *Murphy* v. *Sons & Daughters of Jacob*, 50 L. R. A., 111; *Sourwine* v. *Supreme Lodge K. of Pythias*, 54 Am. St. Rep., 532; *Am. Mutual Aid Society* v. *Helburn*, 85 Ky., 1; *Wolf* v. *Dist. Gr. Lodge*, 102 Mich., 23.

MAYES, J., delivered the opinion of the court.

After the most careful review of this record, we feel compelled to differ from the chancellor in the conclusion reached by him that there was a contract of insurance. Of course, if no contract of insurance had been effected, there could be no recovery, and our view of this record is that Vinton M. Hand, deceased, who it is claimed had taken out an insurance policy for the sum of $1,500 in the Brotherhood of Locomotive Firemen, never effected any insurance, and therefore there was no right to recovery. We deem it needless to rehearse the testimony in this case, further than to say that, though Vinton M. Hand

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made application for insurance, it was never effected, because of the noncompliance by him with the regulations of the order.

Wherefore the decree appealed from is reversed, and the bill *dismissed.*

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ABATEMENT ACT.

1. TAX-TITLES. *Sales. Time. Laws* 1875, p. 49.

A sale made on May 10, 1875, for the taxes of the year 1874 can not be a sale under the Abatement Act (Laws 1875, p. 49) and is void, the law requiring sales for the taxes of the year 1874 to be made in February, 1875. *Kennedy* v. *Sanders*, 524.

2. SAME. *Appeals. Theory of defense. Inconsistency.*

When defendants in a suit to quiet title claimed on the trial under a tax sale made on May 10, 1875, for the taxes of 1874, they can not on appeal claim title under the Abatement Act. *Ib.*

3. SAME. *Land sales. Evidence.*

A tax sale to the state under the Abatement Act can not be maintained without independent evidence that by reason of its delinquency for taxes of years prior to 1874 the land belonged to the class contemplated by the act, the mere production of the sales list to the state and the state's deed to the claimant being insufficient. *Ib.*

4. SAME. *Delinquency. Evidence. Assessment roll.*

An assessment of land to the state shown by a roll filed August 5, 1875, is imputable to a sale to the state that occurred on May 5, 1875, and not to a sale in 1874 for the taxes of 1873, or to some earlier sale. *Ib.*

5. SAME. *Limitations. Inapplicability.* Code 1871, § 1709; Code 1880, § 539.

A tax-collector being without power to sell under the Abatement Act land not delinquent for taxes that accrued prior to the year 1874, his sale of such land is void, and none of the statutes of limitations designed specially to protect tax titles are applicable to a claim under such sale. *Ib.*

ABSENT WITNESS.

1. CRIMINAL LAW AND PROCEDURE. *Continuance.*

Where in a prosecution for murder the position of the body of the deceased when shot was material as determining the guilt

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ABSENT WITNESS—*Continued.*

or innocence of the accused, and there was no lack of diligence on his part to procure the attendance of the witness, the case should have been postponed on his application so as to secure the testimony of the person who was first upon the scene after the shooting and who placed the deceased in a bed before any one else arrived. *Watts* v. *State*, 757.

2. SAME. *Affidavit. Effect of admission.*

Upon the second trial of an accused charged with homicide, the defendant being the only witness to the killing in his behalf, it was error to permit the state to show that the defendant's absent witness was present but not introduced by him at the former trial, the state having agreed that the witness if present would testify as shown in an affidavit read to the jury. *Smith* v. *State*, 111.

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In a prosecution for homicide the statement of the decedent, being neither a part of the *res gestæ* nor a dying declaration, although made shortly after the fatal encounter and in the hearing of the defendant, is not admissible in evidence if defendant did not assent to it by silence or otherwise. *Johnson* v. *State*, 317.

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ADVANCEMENTS.

1. WILLS. *Receipts. Relinquishment of right in estate.*

Where a testator during his life made advancements to his adult children, taking receipts from them in full of their interest in his estate, the receipts are in the nature of contracts and extinguish the rights of the parties giving them, and of their heirs, in testator's estate. *Norfleet* v. *Callicott*, 221.

2. SAME. *Widow's right. Renunciation of will.*

Where three of six children of a decedent received advancements from him and gave contractual receipts extinguishing all their right in his estate, his widow by renouncing his will, under Code 1892, § 4496, authorizing such renunciation, became entitled to one-fourth of the estate. *Ib.*

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AGENT AND AGENCY.

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A corporation is liable for slander uttered by its agent acting within the scope of his employment and in the performance of his duties touching the matter in question. *Rivers* v. *Yazoo, etc., R. R. Co.*, 196.

2. SAME. *Knowledge. Approval. Ratification.*

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AGENT AND AGENCY—*Continued.*

3. PRINCIPAL AND AGENT. *Unauthorized act. Scope of agency. Duty to ascertain. Contracts.*

Persons who deal with the agent of another must learn the scope of his authority or act at their own peril. *Busby* v. *Yazoo, etc., R. R. Co.*, 13.

4. INSURANCE. *Regulation of agents. License fees. Surety companies. Code* 1906, § 3828.

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2. CRIMINAL LAW AND PROCEDURE. *Indictment. Code* 1906, § 1509.

Where the prosecuting attorney, without leave of court and in disregard of Code 1906, § 1509, providing how indictments may be amended, changed the name of the party alleged to have been assaulted in an indictment for an assault with intent to kill and murder, defendant's motion to quash the amended indictment, the facts being shown, should have been sustained and its denial by the trial court constitutes reversible error. *Shurley* v. *State*, 415.

3. SAME. *How.*

An indictment can only be amended as provided by Code 1906, § 1509, regulating the subject and requiring an order on the minutes of the court specifying the amendment. *Ib.*

4. SAME. *Indictment. Code* 1906, § 1509. *Order on minutes. Entry nunc pro tunc.*

An order of court actually made, under Code 1906, § 1509, regulating the subject, authorizing the amendment of an indictment,

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AMENDMENTS—*Continued.*

may be entered on the minutes of the court, from which inadvertently omitted, after the conviction of defendant and upon the hearing of a motion for a new trial or other motion predicated of the omission. *Richburger* v. *State*, 806.

5. CRIMINAL LAW AND PROCEDURE. *Code* 1906, § 4936. *Objections not made on trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, unless made a ground of special exception at the trial, an objection that an indictment was amended without entry on the minutes of the order allowing it, as required by Code 1906, § 1509, can not be heard for the first time on appeal. *Ib.*

6. PARTIES. *Substitution. Amendment. Trustee having legal title. Practice.*

Where the beneficiary in a deed of trust erroneously brought an action of replevin in his own name for the property conveyed, an amendment making the trustee plaintiff in the suit, seasonably asked, should have been allowed in the circuit court, although the case originated in a justice of the peace court. *McCue* v. *Massey*, 124.

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2. CHANCERY PRACTICE. *Appeal. Code* 1892, § 34 (*Code* 1906, § 35), *Interlocutory decree. Settle principles. Strangers to suit.*

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Appeals.

APPEALS—*Continued.*

3. CHANCERY PRACTICE. *Intervention not a right. New suit. County district controversy. Election.*

The remedy of a person, claiming that a bill by taxpayers to enjoin the board of supervisors and election commissioners of a county from holding an election under an act providing for the division of the county into two court districts on the ground that the suit was filed by collusion between the parties, is by an independent bill against both parties, and not by intervening in that suit and making a new cause by a charge of collusion. *Bush* v. *Quick*, 32.

4. HARMLESS ERROR.

Where, on a trial for embezzlement in violation of Code 1892, § 1058, making an officer of an incorporated company, who shall embezzle or fraudulently secrete, conceal, or convert to his own use the goods of the company, guilty of embezzlement, it appeared clearly that accused was guilty of every act of embezzlement shown by the testimony, the error, if any, in refusing to require the state to elect on which act it would rely for a conviction, is not reversible. *Starling* v. *State*, 255.

5. INCONSISTENT POSITION.

Where defendants in a suit to quiet title claimed on the trial under a tax sale made on May 10, 1875, for the taxes of 1874, they cannot on appeal claim title under the Abatement Act. *Kennedy* v. *Sanders*, 524.

6. INTERLOCUTORY CIRCUIT COURT JUDGMENTS. *Code* 1906, § 4910; *Code* 1906, § 4911.

Code 1906, § 4910, purporting to provide that a circuit court should not grant a new trial because of an excessive verdict but that the supreme court might in such case require a remittitur, and Code 1906, § 4911, purporting to authorize appeals from certain interlocutory judgments of the circuit court, being parts each of the other, and one of them being unconstitutional, the other falls with it. *Yazoo, etc., R. R. Co.* v. *Reid*, 616.

7. SUPREME COURT PRACTICE. *Code* 1906, § 4936. *Questions not raised at trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, if not made a ground of special exception in the trial court, a conviction of a cashier of a bank for embezzlement from the bank will not be reversed because the indictment charged him as cashier, and not as a director, agent, clerk, servant, or officer of a corporation, where

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APPEALS—*Continued.*

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8. SUPREME COURT PRACTICE.

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APPELLATE JURISDICTION.

CONSTITUTIONAL LAW. *Courts. Supreme Court. New trials. Excessive verdicts. Remittiturs. Code* 1906, § 4910.

Code 1906, § 4910, purporting to deprive the circuit courts of power to grant defendants new trials for excessive verdicts and to authorize the supreme court alone to require remittiturs, is unconstitutional:—

(*a*) It denies a defendant the right to have a complete disposition of his case in a forum provided by the organic law for the administration of justice to all; and

(*b*) It undertakes to confer original jurisdiction on the supreme court to which under the constitution appellate jurisdiction alone belongs. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.

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Where the machinery of a railroad company was of a kind in general use, approved by the experience of many roads, and neither defective nor unsafe, the company is not liable for a death resulting from its use, notwithstanding a promise to substitute therefor other and safer machinery which might have prevented the fatal accident. *Jones* v. *Yazoo, etc., R. R. Co.*, 547.

ARCHITECT.

CONTRACTS. *Performance. Acceptance by. Fraud. Pleading. Evidence.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising architect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and

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ARCHITECT—*Continued.*

(*b*) Evidence that the architect acted fraudulently, or made such mistake, is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful. *Standard, etc., Co. v. Brantley, etc., Co.*, 16.

ARGUMENT.

1. CRIMINAL LAW AND PROCEDURE. *Homicide. Trial. Remarks of court.*

On appeal from a conviction of manslaughter prejudicial error cannot be predicated of the fact that the prosecuting attorney in his argument said—there being evidence of which to predicate the statements—that the accused was as guilty as he could be; that he was a bloody assassin; that accused was an athlete and sprang to his feet and shot deceased in the back of his head and then shot another person; that accused murdered decedent in cold blood, and called on the jury whether they would put a stop to the homicides of which three or four had been committed within the last few months by negroes, and that the proof showed that accused had not lived with his wife for two years. *Gray* v. *State*, 235.

2. SAME. *Misconduct of counsel.*

The trial court should not hesitate of its own motion to prevent counsel for the state from abusing his right to argue the cause to the jury. *Richburger* v. *State*, 806.

ARSON.

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Two offenses in same count.*

An indictment which charges two distinct offenses, punishable by different terms of imprisonment, in the same count is demurrable. *State* v. *Freeman*, 315.

2. SAME. *Burning of house. Personalty therein.*

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ASSAULT AND BATTERY, CIVIL ACTION.

1. LIABILITY. *Defense. Consent and Provocation. Code* 1892, § 1428.

The acceptance by defendant of plaintiff's challenge to fight and engaging in a fight in pursuance thereof, are unlawful, and the

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Assault and battery.

ASSAULT AND BATTERY—*Continued.*

challenge affords no defense to a civil action for an assault and battery under Code 1892, § 1428, providing that in all trials for assault and battery, the defendant may give in evidence, in excuse or justification, any insulting words used towards him at the time by the person assaulted. *Lizana* v. *Lang*, 469.

2. LIABILITY. *Instruction.*

In such case, it appearing that defendant did not commit the act complained of at the time he was challenged to fight, but went one hundred and twenty-five feet, procured weapons from his desk and returned before striking plaintiff, it was error to give defendant's instruction to the effect that if plaintiff voluntarily entered into and provoked a quarrel with defendant, and used language inviting a fight, for the purpose of, and calculated to bring on a fight, he was not entitled to recover. *Ib.*

3. SAME. *Excessive beating.*

In a civil action for damages, the fact that the difficulty was provoked by plaintiff, affords no justification for an excessive assault and battery. *Ib.*

ASSAULT AND BATTERY WITH INTENT TO KILL AND MURDER.

1. CRIMINAL LAW AND PROCEDURE. *Homicide. Instructions. Deliberation. Use of weapon.*

In a prosecution for an assault with intent to murder, instructions authorizing a conviction as charged "even if the blow was struck with a single-barreled shotgun without malice" and announcing that "the law presumes malice from the unlawful and deliberate use of a deadly weapon," are erroneous as justifying an inference that the judge thought there was unlawful and deliberate use of the loaded gun as a deadly weapon, although it was not fired. *Woods* v. *State*, 245.

2. SAME.

Where, on a trial for assault with intent to kill, the defense was that the shooting was accidental, and the facts were shown by eyewitnesses, an instruction that if accused deliberately raised a loaded gun and fired it at the prosecutor only a few feet away, and shot him, inflicting a wound, the law presumed that accused intended to kill the prosecutor unless the contrary appeared, was erroneous for failing to include the idea that the shooting must be believed to have been by design, and not accidental. *Bell* v. *State*, 104.

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ASSAULT AND BATTERY—*Continued.*

3. MUNICIPALITIES. *Ordinances. Crimes. Municipal offenses. Felonies. Code* 1906, § 3410.

A municipal ordinance undertaking to make all crimes against the state, including felonies committed within municipal limits, a municipal offense, is void; Code 1906, § 3410, giving all the authority granted in the premises, expressly limits the power to misdemeanors. *Oakland* v. *Miller*, 275.

ASSESSMENTS.

EVIDENCE. *Rolls.*

An assessment of land to the state shown by a roll, filed Aug. 5, 1875, is imputable to a sale to the state that occurred on May 5, 1875, and not to a sale in 1874 for the taxes of 1873, or to some earlier sale. *Kennedy* v. *Sanders*, 524.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

SECURED CREDITOR. *Distribution.*

A non-preferential assignment for the benefit of creditors must be treated as providing for payment of liabilities ratably, and a creditor who holds collateral security for his debt is not entitled thereunder to dividends on the face of his claims without crediting the value of the collaterals. *Kretschmar* v. *Bank*, 363.

ATTACHMENTS IN CHANCERY.

JURISDICTION. *Personal decree. Code* 1906, § 536. *Proceedings.*

Under Code 1906, § 536, providing for attachments in chancery against nonresident debtors, a court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of complainant's debt not realized by sale of the attached property. *Hall, etc., Co.* v. *Foote*, 422.

2. REMEDIAL STATUTES. *Vested right.*

A litigant has no vested right in a rule of procedure or a remedial statute. *Ib.*

BANK DEPOSIT.

Where the cashier of a bank in failing circumstances misappropriated five hundred dollars of its funds, his account being largely overdrawn, it was no defense to a prosecution for em-

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BANK DEPOSIT—*Continued.*

bezzlement that he deposited to his general account after such misappropriation five hundred and four dollars, since, under the rule of appropriation of payments, such deposit was properly applied to the former overdraft. *Richburger* v. *State*, 806.

BENEFIT SOCIETIES.

1. INSURANCE. *Contracts. Application rejected.*

A contract cannot be predicated of an application to a benefit association for life insurance by one who failed to comply with the regulations of the order and whose application was not passed upon by the medical examiner of the association until after the applicant's death, and then rejected. *Brotherhood, etc.*, v. *Hand*, 893.

2. MEMBERSHIP. *Recourse to courts. Remedies within order.*

Where the laws of a benefit society provide appeals for the correction of erroneous decisions touching the rights of its members, an application by a member to the courts for relief will not be entertained until he has exhausted his remedies within the society. *Ward* v. *Odd Fellows*, 116.

3. NEW LAWS. *Validity.*

A duly enacted law of a benefit society creating a compulsory insurance department, requiring the payment of a dollar per month by its members, except the aged and disabled, and barring those who fail to pay from meeting with a lodge is reasonable and valid, and, the by-laws authorizing it, may be applied as well to existing as to new members. *Ib.*

4. INSURANCE. *By-laws. Construction. Forfeitures.*

The by-laws of a mutual benefit society are to be liberally construed in favor of the insured, so as to prevent a forfeiture. *Morgan* v. *Independent Order*, 864.

5. SAME. *Rules.*

Mutual benefit societies are subject to the same rules of law as other life insurance companies, save in so far as such rules may be lawfully modified by the objects and purposes of the society's organization. *Ib.*

6. SAME. *Waiver. Estoppel.*

An insurance company or benefit society can not exempt itself in advance, either by contract or by-laws, from an estoppel to assert

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BENEFIT SOCIETIES—*Continued.*

a forfeiture of a policy where there has been a breach of conditions on the part of the insured and the society's conduct has been such as to affirmatively induce the belief that the forfeiture was waived. *Morgan* v. *Independent Order*, 864.

7. INSURANCE. *Case.*

Under the by-laws of a benefit society, requiring payment of one dollar in advance on the first day of each month and declaring that a member who failed to pay an assessment, on or by the day it becomes due, was thereby suspended, and providing that a suspended member could be reinstated only in a designated way; a member was not suspended who fully paid all demands for eleven years, because he was then delinquent one day in the payment of one dollar, received from him the next day, as were all subsequent assessments when due, without question. *Ib.*

BILL OF PARTICULARS.

1 CRIMINAL LAW AND PROCEDURE. *Right to demand.*

A party will not be obliged to furnish facts already known to his adversary, nor will a bill of particulars be ordered when the means of obtaining the facts are equally accessible to both parties. *Starling v. State*, 255.

2. SAME. *Appeal. Discretion. Review.*

Whether the trial court should grant or deny an application for a bill of particulars being within its discretion, the overruling of accused's objection to a bill of particulars furnished under the court's order, which proved unsatisfactory, will not be reviewed on appeal, unless a gross abuse of discretion be shown. *Richburger* v. *State*, 806.

BONDS.

PENALTY. *Liquidated damages. United States mail. Subcontractor.*

A bond given to a contractor by a subcontractor to secure the carrying of the United States mail between designated points, with a stipulation that the amount should be deemed as liquidated damages, is nevertheless penal and only actual damages can be recovered for its breach. *Coker* v. *Brevard*, 64.

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BROKERS.

1. CONTRACTS. *Commissions. Recovery. Unilateral agreements.*

A promise by the owner of property to pay a broker a commission on its sale when made by either of them is unilateral; and if the owner effects the sale the broker cannot recover commissions; but if the broker effects the sale his commissions are recoverable. *Taylor* v. *Barbour*, 888.

2. SAME. *Consideration.*

If in such case the owner make the sale by the aid of the broker, such aid will constitute a consideration and entitle the broker to recover his commissions. *Ib.*

BUILDING AND LOAN ASSOCIATIONS.

LOANS. *Accountings. Stock dues. Usury.*

A true building and loan association, issuing stock to its members, and exacting stock dues in good faith and not as a cloak for usury, is not to be charged with payments made on such dues in an accounting with a borrowing member, where the inquiry is whether the loan to him was usurious. *Bank* v. *Armor*, 709.

BULK-SALES.

MORTGAGES. *Deeds of trust. Foreclosure sale. Constitution* 1890, sec. 111; *Code* 1892, § 2443.

The lump sale under a mortgage or deed of trust of a four hundred acre tract of land is void if made in violation of Constitution 1890, sec. 111, providing for the sale of lands, under decrees and executions in subdivisions not exceeding one hundred and sixty-acres, as extended to sales under mortgages and deeds of trust by Code 1892, § 2443. *McClusky* v. *Trussel*, 544.

BURDEN OF PROOF.

1. CONCEALED FRAUD. *Code* 1906, § 3109.

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim. *Gordon* v. *Anderson*, 677.

2. DEEDS. *Undue influence. Fairness of transaction.*

A deed executed by an infirm and feeble-minded person for an inadequate consideration will be cancelled by a court of equity

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Burden of proof—Chancery pleading and practice.

BURDEN OF PROOF—*Continued.*

in the absence of evidence showing the fairness of the transaction and the grantor's capacity to make the deed. *Leach* v. *Hirshman*, 723.

BY-LAWS.

MUTUAL BENEFIT SOCIETIES. *Construction. Forfeitures.*

The by-laws of a mutual benefit society are to be liberally construed in favor of the insured, so as to prevent a forfeiture. *Morgan* v. *Independent Order, etc.*, 864.

BYSTANDER.

See RAILROADS, 9.

Coleman v. *Yazoo, etc., R. R. Co.*, 629.

CARRIERS.

See RAILROADS, 4, 8, 9, 10, 11, 12, 13.

Yazoo, etc., R. R. Co. v. *Keystone, etc., Co.*, 391; *Coleman* v. *Yazoo, etc., R. R. Co.*, 629; *Illinois, etc., R. R. Co.* v. *Gortikov*, 787.

CHANCERY CLERK.

1. TAX SALES. *Purchaser. Validity.*

The purchase of land at tax sale by a chancery clerk is void, since the performance of official duties for which he is compensated involves acts relating to such sales. *Barker* v. *Jackson*, 621.

2. SAME. *Statute of limitations. Code* 1880, § 539; *Code* 1892, § 2735.

The three-years statutes of limitation has no application to an illegal purchase of lands by the chancery clerk at a tax sale. *Ib.*

CHANCERY PLEADING AND PRACTICE.

1. APPEAL. *Code* 1892, § 34 (Code 1906, § 35). *Interlocutory decree. Settle principles. Strangers to suit.*

A stranger to an equity suit, whose petition to become a party has been denied, cannot appeal from the denial to the supreme court, under Code 1892, § 34 (Code 1906, § 35), authorizing appeals from interlocutory decrees in order to settle the principles of the case. *Bush* v. *Quick*, 32.

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Chancery pleading and practice.

CHANCERY PLEADING AND PRACTICE—*Continued.*

2. APPEAL. *Intervention not a right. New suit. County district controversy. Election.*

The remedy of a person, claiming that a bill by taxpayers to enjoin the board of supervisors and election commissioners of a county from holding an election under an act providing for the division of the county into two court districts on the ground that the suit was filed by collusion between the parties, is by an independent bill against both parties, and not by intervening in that suit and making a new cause by a charge of collusion. *Bush* v. *Quick*, 32.

3. ATTACHMENTS IN CHANCERY. *Code* 1906, § 536. *Proceedings. Jurisdiction. Personal decree.*

Under Code 1906, § 536, providing for attachments in chancery against nonresident debtors, a court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of complainant's debt not realized by sale of the attached property. *Hall, etc., Co.* v. *Foote*, 422.

4. SAME. *Remedial Statutes. Vested right.*

A litigant has no vested right in a rule of procedure or a remedial statute. *Ib.*

5. CRIMINAL PROSECUTIONS. *Injunction. Disturbing peace. Megaphone.*

Equity will not enjoin the making of affidavits against a merchant and the arresting and fining him for alleged disturbances of the peace in using a megaphone to call attention to a clearance sale; there being in a just sense no property right involved and his rights, whatever they be, are determinable in the law courts. *Pleasants* v. *Smith*, 440.

6. MORTGAGES. *Foreclosure of second. Rights under partly void first.*

Where the description of a part of the property sought to be conveyed by a first deed of trust was void and a second deed of trust on the same property accurately described the whole of it, but recited that a "part of the above property" was subject to the prior deed; and there was a foreclosure of the second deed and a purchase of all the property by the beneficiary therein, the beneficiary in the first deed, by appropriate proceedings can:—

(*a*) Compel the purchaser to account for the value of the property accurately described in the first deed; and

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Chancery pleading and practice.

CHANCERY PLEADING AND PRACTICE—*Continued.*

(*b*) Recover a personal decree against his debtor, the grantor in the first deed, for the sum due him after giving credit for the value of the property for which he has held the purchaser under the second deed. *Fullerton* v. *McBride*, 420.

7. MORTGAGES. *Satisfaction. Subrogation.*

A party to a void marriage who, honestly believing that he is the husband of the other party thereto, on her verbal promise to convey him a half interest in the property, satisfies a mortgage on her land, is a mere volunteer and not entitled to be subrogated to the rights of the mortgagee. *Brown* v. *Brown*, 410.

8. NAVIGABLE WATERS. *Obstructions. Pleadings.*

A bill in equity to compel the removal of obstructions to the navigation of a stream created by a railroad company is not demurrable if it show that complainant has a special statutory exclusive right for a term of years to navigate the stream and that the defendant has constructed railroad bridges across it in such a way as to needlessly obstruct navigation and had thereby interfered with complainant's enjoyment of its exclusive right. *Silver Creek, etc., Co.* v. *Yazoo, etc., R. R. Co.*, 345.

9. NEGLIGENCE. *Judgment. Injunction.*

Equity will not aid the negligent by enjoining the collection of an erroneous judgment at the instance of a defendant therein who failed to avail of a full, adequate, and complete legal remedy for its correction. *Gum Carbo Co.* v. *New Orleans, etc., Gazette*, 177.

10. PARTIES. *Partition. Partnership accounting.*

In a suit for partition of lands, formerly belonging to complainant and a third person as partners, and for an accounting of the partnership affairs, so that the sum due complainant arising therefrom may be charged upon defendant's interest in the lands, the former partner is a necessary party to the suit, although before suit begun he conveyed his entire interest in the lands to defendants and complainant sold to him all the partnership property except the lands. *Moses* v. *Krauss*, 618.

11. TAX-TITLES. *Bill to confirm. Parties. Code* 1892, § 498 (*Code* 1906, § 548).

A bill to confirm a tax-title under Code 1892, § 498, providing that all persons interested be made defendants is demurrable for want of proper parties where one named in the tax-deed ex-

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Chancery pleading and practice.

CHANCERY PLEADING AND PRACTICE—*Continued.*

hibited with the bill as the person assessed with the taxes for which the land was sold, is not made a defendant, nor any reason given for such omission, although the bill is verified by oath and alleges "that the defendants named are the only ones, so far as complainant can ascertain after diligent inquiry." *Smith* v. *Denny Co.*, 434.

12. TAX-TITLES. *Leave to amend. Dismissal.*

Where a demurrer to a bill has been sustained for want of proper parties, it is not error to dismiss the bill on complainant's declining to avail of leave to amend by joining as a defendant the party improperly omitted. *Ib.*

13. SAME. *Pleadings. Averments as to title. Collector's deed. Effect of same. Code* 1892, § 1806 (*Code* 1906, § 1983).

A bill to confirm a tax-title which avers that complainant acquired title through his purchase at a tax-collector's sale, evidenced by the collector's deed exhibited with the bill, sufficiently sets out complainant's title, since under Code 1892, § 1806 (Code 1906, § 1983) the collector's deed to an individual is *prima facie* evidence that the assessment and sale of the land were legal and valid. *Ib.*

14. TENDER. *Partition.*

A defendant in a partition suit, who by his answer claims a greater interest in partnership lands than the complainant, his copartner, concedes to be his, should not be denied his share as claimed because of his failure to pay into the court a balance due on his contribution to the joint purchase when by his answer and testimony he denies knowledge of the amount of such balance and alleges his readiness to pay the same when ascertained and previous offers by him so to do. *Pierce* v. *Halsell*, 171.

15. VENDOR AND VENDEE. *Lien. Purchase money. Erection of plant. Payment out of gross receipts.*

The lien of a vendor of land for a fixed part of the unpaid purchase money is not affected by a provision in the deed that payment is to be made out of the gross receipts of a manufactory to be erected on the land by the vendee, which was never in fact erected. *Burroughs* v. *Gilliland*, 127.

16. SAME. *Equity practice. Conflict between bill and exhibits.*

A conflict between some of the allegations of a bill of complaint and the exhibits thereto is not fatal on demurrer if the other allegations and exhibits present a good case. *Ib.*

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CHARACTER.

EVIDENCE. *Injured party.*

The state cannot show the good character of the party assaulted in a prosecution for the assault where his character was not attacked. *Woods* v. *State*, 245.

CHARITY.

SALE OF FRUIT. *Sunday.*

The sale of fruit is not a work of necessity or charity within the exceptions to the Sunday law. *Gulfport* v. *Stratakos*, 489.

CHARTER.

See CONSTITUTIONAL LAW, 7, 8.

Gulf, etc., R. R. Co. v. *Adams*, 559.

CIRCUIT COURTS.

JURISDICTION. *Special Term. Order. Entry on minutes. Code* 1906, § 988.

The failure of the clerk to enter on the minutes of a circuit court an order for a special term thereof, which was duly made and published, does not affect the validity of proceedings had at such term, though Code 1906, § 988, provides that such order shall be entered on the minutes as well as be made and published. *Ex parte Neil*, 518.

CIRCUMSTANTIAL EVIDENCE.

1. CRIMINAL LAW AND PROCEDURE. *Murder.*

Where the accused in a prosecution for murder resting entirely on circumstantial evidence has introduced testimony which would prove an alibi, if credited, it is error not to admit evidence to the effect that disreputable characters in whose company the deceased had been on the night of his death left the state on the following day. *Haywood* v. *State*, 461.

2. SAME. *Instruction.*

Circumstantial evidence is inferior to the testimony of eyewitnesses, and it is error to instruct in a murder trial, where the evidence for the defense would prove an alibi, if credited, that it is as good as any other kind of evidence and that when-

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Circumstantial evidence—Code 1892.

CIRCUMSTANTIAL EVIDENCE—*Continued.*

ever it generates full conviction of guilt beyond a reasonable doubt, the jury should act on such evidence as readily as on any other. *Haywood* v. *State*, 461.

CLOUDS ON TITLE.

REMOVAL. *Limitations. Code* 1892, § 2731.

A proceeding in equity by the holder of a valid paper title to land to remove a cloud thereon asserted by one not in possession is not barred by his failure to sue within the period he might have made an entry or sued at law to recover the land under Code 1892, § 2731, providing that suits in equity to recover land may not be brought but within the period during which by virtue of § 2730 of said code he might have made an entry or brought an action to recover the land, if he had been entitled at law. *Kennedy* v. *Sanders*, 524.

CODE. 1871.

1. § 1709. Tax title. Special statute of limitations. *Kennedy* v. *Sanders*, 524.
2. § 1956. Homestead. Inheritance. Right of widow. *Warren* v. *Davis*, 336.

CODE, 1880.

§ 539. Tax title. Special statute of limitations. *Eastland* v. *Yazoo, etc., Lumber Co.*, 330; *Kennedy* v. *Sanders*, 524; *Barker* v. *Jackson*, 621.

CODE, 1892.

1. § 34. Appeals. Interlocutory decrees. Settle principles of case. *Bush* v. *Quick*, 32.
2. § 498. Tax titles. Suits to confirm. Parties. *Smith* v. *Denny Co.*, 434.
3. § 1058. Criminal Law. Embezzlement. Election. *Starling* v. *State*, 255.
4. § 1108. Same. Forgery. Indictment. *State* v. *Starling*, 252.
5. § 1428. Assault and battery. Civil liability. Evidence. *Lizana* v. *Lang*, 469.
6. § 1545. Husband and wife. Descent and distribution. *Norfleet* v. *Callicott*, 221.
7. § 1806. Tax titles. Evidence. *Smith* v. *Denny*, 434.

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Code, 1892—Code, 1906.

CODE, 1892—*Continued.*

8. § 2355. Jurors. Qualifications. *Cook* v. *State*, 137.
9. § 2389. Same. Selection. *Cook* v. *State*, 137.
10. § 2436. Land and conveyances. Succession of donees. *Brinson* v. *Sandifer*, 41.
11. § 2443. Deeds of trust. Sales under. *McClusky* v. *Trussel*, 544.
12. § 2451. Mortgages. Satisfaction of record. *Pierce v. Kingston Lumber Co.*, 216.
13. § 2735. Tax sale. Unconstitutional law. Statute of limitations. *Eastland* v. *Yazoo, etc., Lumber Co.*, 330.
14. § 2757. Statute of limitations. Acknowledgment of debt. *Stewart* v. *Foreman*, 85.
15. § 2939. Road taxes. Municipalities. *Lincoln County* v. *Brookhaven*, 5.
16. § 3119. Partition. Solicitor's fees. *Bowles* v. *Wood*, 742.
17. § 3410. Municipalities. Ordinances. Crimes. *Oakland* v. *Miller*, 275.
18. § 3931. Road taxes. Municipality. *Lincoln County* v. *Brookhaven*, 5.
19. § 4229. Statute of frauds. Sale of goods. *Ladnier* v. *Ladnier*, 475.
20. § 4496. Wills. Renunciation. Widow. *Norfleet* v. *Callicott*, 221.
21. § 4775a. Statute of Frauds. Debt of another. *Meyer-Bridges Co.* v. *Badeau*, 27.

CODE, 1906.

1. § 35. Appeals. Interlocutory chancery decrees. *Bush* v. *Quick*, 32.
2. § 536. Attachments in chancery. Jurisdiction. Personal decree. *Hall, etc., Co.* v. *Foote*, 422.
3. § 548. Tax titles. Confirmation. Parties. *Smith* v. *Denny*, 434.
4. § 793. Instructions. *Canterbury* v. *State*, 279.
5. § 925. Eminent domain. Telephone companies. *Cumberland, etc., Co.* v. *Railroads*, 686.
6. § 929. Eminent domain. Telephone companies. *Cumberland, etc., Co.* v. *Railroads*, 686.
7. § 1136. Embezzlement. Care. Possession. *Richburger* v. *State*, 806.
8. § 1367. Sunday. Selling fruit. Stores. *Gulfport* v. *Stratakos*, 489.
9. § 1404. Criminal law. Venue. *Richburger* v. *State*, 806.
10. § 1405. Same. *Richburger* v. *State*, 806.
11. § 1509. Indictments. Amendments. *Shurley* v. *State*, 415.

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CODE, 1906—*Continued.*

12. § 1509. Same. Order on minutes. Nunc pro tunc. *Richburger* v. *State*, 806.
13. § 1876. Eminent domain. Telegraph companies. *Cumberland, etc., Co.* v. *Railroads*, 686.
14. § 1983. Tax titles. Confirmation. Evidence. *Smith* v. *Denny*, 434.
15. § 2303. Gambling. Futures. Wife to sue. *Minkus* v. *Armstrong*, 751.
16. § 2401. Justice of the peace. Filing statement of case. *Greenburg* v. *Massey*, 121.
17. § 2564. Insurance. Certificate to do business. *Farmers, etc., Co.* v. *Cole*, 508.
18. § 3058. Mechanic's liens. Material men. *Lake* v. *Brannin*, 737.
19. § 3074. Same. *Lake* v. *Brannin*, 737.
20. § 3118. Limitations. New promise. Acknowledgment of debt. *Stewart* v. *Foreman*, 85.
21. § 3446. Municipalities. Contracts. Not retroactive. *Noxubee, etc., Co.* v. *Macon*, 636.
22. § 3542. Partition. Solicitor's fee. *Bowles* v. *Wood*, 742.
23. § 3828. Insurance. Fees. Surety companies. *Cole* v. *American, etc., Co.*, 782.
24. § 4910. Jurisdiction. Circuit court. Supreme court. Excessive verdicts. Remittiturs. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.
25. § 4910. Same. *Yazoo, etc., R. R. Co.* v. *Reid*, 616.
26. § 4911. Appeal. Interlocutory judgment. *Yazoo, etc., R. R. Co.* v. *Reid*, 616.
27. § 4936. Supreme court practice. Question not raised in trial court. *Richburger* v. *State*, 806.

COMMENT ON DEFENDANT'S FAILURE TO TESTIFY.

See CRIMINAL LAW AND PROCEDURE, 1.

Smith v. *State*, 111.

COMMISSIONS.

See BROKERS, 1, 2.

Taylor v. *Barbour*, 888.

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CONCEALED FRAUD.

FRAUDULENT CONVEYANCE. *Code* 1906, § 3109. *Burden of proof.*

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim. *Gordon* v. *Anderson*, 677.

CONDITIONAL SALES.

1. PARTIES. *Reservation of title.*

One who sells to his partner, with a reservation of title until payment, his undivided interest in partnership property previously sold by the firm with a like reservation of title, may, on default of the firm's vendee, whose purchase money notes are held by him as collateral security, maintain replevin for the property without making his partner a party. *Brumfield* v. *Hoover*, 502.

2. RESALE BY BUYER. *Remedy.*

Where a seller reserved title to personal property sold by him to secure the purchase price, he may assert such title to enforce payment against the buyer and those claiming under him, in the absence of evidence that he knew the buyer was a dealer in such articles and bought to resell. *Fairbanks Co.* v. *Graves*, 453.

3. WAIVER. *Mortgage.*

The retention by the seller of title to personal property conditionally sold to secure the purchase money is not waived by contemporaneously taking a mortgage from the buyer upon the same and other property to secure the debt. *Champenois* v. *Tinsley*, 38.

4. SAME. *Implied waivers.*

The doctrine of implied waiver can be invoked to defeat implied liens, not express ones. *Ib.*

CONFESSIONS.

VOLUNTARY. *Evidence.*

Declarations by an accused, constituting voluntary confessions, are admissible in evidence. *Richburger* v. *State*, 806.

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CONSIDERATION.

VENDOR AND VENDEE. *Lien. Deed. Recited consideration. Actual consideration.*

A grantor who conveys land on the promise of a representative of the grantee to pay an agreed consideration can enforce his lien thereon for the agreed price though his deed recites a less price. *Matthews* v. *Delta, etc., R. R. Co.*, 429.

See BROKERS, 1, 2.

Taylor v. *Barbour*, 888.

CONSTITUTION, 1869.

Art. 12, sec. 22. MARRIAGE. *Slaves. Laws* 1865, *p.* 82, *ch.* 4. *Inheritance.*

Where a negro man and woman, who had lived together in pursuance of a slave marriage until their emancipation, continued to cohabit and hold themselves out to the world as husband and wife after the adoption of Laws 1865, p. 82, ch. 4, and Constitution 1869, art. 12, sec. 22, providing that all persons who had not been married but were then living together as husband and wife should be held to be lawfully married, the husband could not "off with the old love and on with the new" at pleasure, and his children by the wife inherited his property to the exclusion of the descendants of the mistress. *Haines* v. *Haines*, 100.

CONSTITUTION, 1890.

Sec. 16. Obligation of contracts. Not to be impaired. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

Sec. 109. Officers. Municipal contracts. *Noxubee, etc., Co.* v. *Macon*, 636.

Sec. 111. Deeds of trust. Sales under. *McClusky* v. *Trussel*, 544.

Sec. 112. Taxation. Equal and uniform. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

Sec. 169. Indictments. Conclusion. *Starling* v. *State*, 255.

Sec. 193. Railroad employes. Fellow servant. Joinder of causes of action. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.

CONSTITUTION OF THE UNITED STATES.

Art. 1, sec. 10. Contracts. Impairment of obligation. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

Am. XIV. Due process of law. Taking property without. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

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CONSTITUTIONAL LAW.

1. CRIMINAL LAW AND PROCEDURE. *Indictment. Conclusion. Constitutional law. Constitution* 1890, *sec.* 169.

An indictment concluding, as required by Constitution 1890, sec. 169, "against the peace and dignity of the state," is properly concluded, although it contains two or more counts and the quoted words do not follow each count. *Starling* v. *State*, 255.

2. SAME. *Last count bad.*

In such case if the last count of the indictment be held bad on demurrer the conclusion remains and is applicable to each preceding count. *Ib.*

3. COURTS. *Supreme court. Original and appellate jurisdiction. New trials. Excessive verdicts. Remittiturs. Code* 1906, § 4910.

Code 1906, § 4910, purporting to deprive the circuit courts of power to grant defendants new trials for excessive verdicts and to authorize the supreme court alone to require remittiturs, is unconstitutional:—

(*a*) It denies a defendant the right to have a complete disposition of his case in a forum provided by the organic law for the administration of justice to all; and

(*b*) It undertakes to confer original jurisdiction on the supreme court to which under the constitution appellate jurisdiction alone belongs. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.

4 DECLARATIONS. *Constitution* 1890, *sec.* 193. *Misjoinder of causes of action.*

In a suit against a railroad corporation a common law cause of action for the company's negligence in failing to furnish a safe road bed and machinery cannot be joined in the same count of a declaration with a cause of action arising from the negligence of plaintiff's fellow servants, under Constitution 1890, sec. 193, since they are inconsistent. *Ib.*

5. MARRIAGE. *Slaves. Laws* 1865, *p.* 82, *ch.* 4; *Constitution* 1869, *art.* 12, *sec.* 22. *Inheritance.*

Where a negro man and woman, who had lived together in pursuance of a slave marriage until their emancipation, continued to cohabit and hold themselves out to the world as husband and wife after the adoption of Laws 1865, p. 82, ch. 4, and Constitution 1869, art. 12, sec. 22, providing that all persons who had not been married but were then living together as husband and wife should be held to be lawfully married, the husband could not "off with the old love and on with the new" at pleasure, and

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Constitutional law.

CONSTITUTIONAL LAW—*Continued.*

his children by the wife inherited his property to the exclusion of the descendants of the mistress. *Haines* v. *Haines*, 100.

6. MUNICIPALITIES. *Constitution* 1890, *sec.* 109. *Equity. Injunctions. Persons in pari delicto. Contracts. Officers. Purchase of supplies.*

Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply. *Noxubee, etc., Co.* v. *Macon*, 636.

7. OBLIGATION OF CONTRACT. *Railroad charter. Constitution of U. S., article* 1, *sec.* 10. *Constitution* 1890, *sec.* 16.

Where chartering a railroad corporation by direct legislative act the state granted it the right to fix, within maximum and minimum limits, the rates to be charged by it for carrying persons and property, the grant is inviolate, under Constitution of the United States, article 1, sec. 10, prohibiting the impairment of the obligation of contracts. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

8. SAME. *Laws* 1898, *p.* 66. *United States Constitution, Fourteenth Amendment. Constitution* 1890, *sec.* 112. *Due process of law. Corporate franchises. Taxation. Double taxation.*

Laws 1898, p. 23, sec. 66, purporting to impose on each railroad company claiming an exemption from state supervision, under maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing

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Constitutional law—Continuance.

CONSTITUTIONAL LAW—*Continued:*

the obligation of contracts shall not be passed, since it impairs the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(*c*) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

(*d*) Considered as an *ad valorem* tax on the value of the exemption as property the additional privilege tax is violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since the revenue laws provide that there shall be an assessment of railroad property for *ad valorem* taxes by the railroad commission, values to be fixed with reference to the earning capacity of the companies and their franchises, and it must be presumed that the commission has considered the exemption as an element of property value. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

9. TAXATION. *Tax sale. Unconstitutional law. Code* 1880, § 539. *Code* 1892, § 2735. *Code* 1906, § 3095. *Statute of limitations.*

A tax sale based upon a pretended assessment, made under a statute violative of the constitution, is not aided by the three years' statute of limitations, Code 1880, § 539, Code 1892, § 2735, Code 1906, § 3095. *Eastland* v. *Yazoo, etc., Lumber Co.*, 330.

CONSTRUCTION.

See DEEDS, 2, 6.

Brinson v. *Sandifer*, 41; *Yazoo, etc., R. R. Co.* v. *Smith*, 44.

See NEW TRIAL.

Richburger v. *State*, 806.

See CONTRACT, 4.

Staple v. *Vicksburg, etc., Co.*, 848.

See BY-LAWS.

Morgan v. *Independent Order*, 864.

CONTINUANCE.

1. CRIMINAL LAW AND PROCEDURE. *Absence of witness.*

Where in a prosecution for murder the position of the body of

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CONTINUANCE—*Continued.*

the deceased when shot was material as determining the guilt or innocence of the accused, and there was no lack of diligence on his part to procure the attendance of the witness, the case should have been postponed on his application so as to secure the testimony of the person who was first upon the scene after the shooting and who placed the deceased in a bed before any one else arrived. *Watts* v. *State*, 757.

2. SAME. *Application.*

An application for a continuance, failing to show that defendant had knowledge that he could prove the matters stated, is insufficient. *Richburger* v. *State*, 806.

3. SAME. *Other evidence. Admissions to prevent.*

The denial of a continuance asked for by a defendant because of the absence of a witness does not constitute reversible error, where the state admitted that the witness, if present, would testify as claimed and the testimony related largely to matters provable by writings easily accessible, and some of them were actually introduced. *Ib.*

CONTESTED ELECTIONS.

See PRIMARY ELECTIONS, 1, 2.

Ramey v. *Woodward*, 777; *State ex rel.* v. *Brown*, 876.

CONTRACTS.

1. ACCEPTANCE BY ARCHITECT. *Fraud. Pleading. Evidence.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising architect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and

(*b*) Evidence that the architect acted fraudulently, or made such mistake, is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful. *Standard, etc., Co.* v. *Brantley, etc., Co.*, 16.

2. BROKERS. *Commissions. Recovery. Unilateral agreements.*

A promise by the owner of property to pay a broker a commission

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Contracts.

CONTRACTS—*Continued.*

on its sale when made by either of them is unilateral; and if the owner effects the sale the broker cannot recover commissions; but if the broker effects the sale his commissions are recoverable. *Taylor* v. *Barbour*, 888.

3. BROKERS. *Consideration.*

If in such case the owner make the sale by the aid of the broker, such aid will constitute a consideration and entitle the broker to recover his commissions.

4. GUARANTY. *Past debt. Construction.*

A tentative and provisional arrangement made between a third party and a water company, evidenced by writing, by which the company was induced to supply water to the owner of a laundry, does not bind the third party to pay a debt due at the time the arrangement was perfected from the owner of laundry to the water company. *Staple* v. *Vicksburg, etc., Co.*, 848.

5. INSURANCE. *Benefit association. Application rejected.*

A contract cannot be predicated of an application to a benefit association for life insurance by one who failed to comply with the regulations of the order and whose application was not passed upon by the medical examiner of the association until after the applicant's death, and then rejected. *Brotherhood, etc.*, v. *Hand*, 893.

6. MUNICIPALITIES. *Constitutional law. Constitution* 1890, *sec.* 109. *Equity. Injunctions. Persons in pari delicto. Officers. Purchase of supplies.*

Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply. *Noxubee, etc., Co.* v. *Macon*, 636.

7. OBLIGATION OF RAILROAD CHARTER. *Constitution of U. S., article* 1, *sec.* 10. *Constitution* 1890, *sec.* 16.

Where chartering a railroad corporation by direct legislative act

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Contracts.

CONTRACTS—*Continued.*

the state granted it the right to fix, within maximum and minimum limits, the rates to be charged by it for carrying persons and property, the grant is inviolate, under Constitution of the United States, article 1, sec. 10, prohibiting the impairment of the obligation of contracts. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

8. OBLIGATION OF RAILROAD CHARTER. *Laws* 1898, *p.* 66. *United States Constitution, fourteenth Amendment. Constitution* 1890, *sec.* 112. *Due process of law. Corporate franchises. Taxation. Double taxation.*

Laws 1898, p. 23, sec. 66, purporting to impose on each railroad company claiming an exemption from state supervision, under maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing the obligation of contracts shall not be passed, since it impairs the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(*c*) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

(*d*) Considered as an *ad valorem* tax on the value of the exemption as property the additional privilege tax is violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since the revenue laws provide that there shall be an assessment of railroad property for *ad valorem* taxes by the railroad commission, values to be fixed with reference to the earning capacity of the companies and their franchises, and it must be presumed that the commission has considered the exemption as an element of property value. *Ib.*

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CONTRACTS—*Continued.*

9. PERFORMANCE. *Reasonable time.*

An agreement to perform an act which fails to specify the time of performance will be treated as providing for performance within a reasonable time. *Burroughs* v. *Gilliland*, 127.

10. PRINCIPAL AND AGENT. *Unauthorized act. Scope of agency. Duty to ascertain. Contracts.*

Persons who deal with the agent of another must learn the scope of his authority or act at their own peril. *Busby* v. *Yazoo, etc., R. R. Co.*, 13.

See RAILROADS, 10, 11, 12, 13.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

See TRUSTS AND COMBINES, 1.

Kosciusko, etc., Co. v. *Wilson, etc., Co.*, 551.

CORPORATIONS.

1. INSOLVENCY. *Receiver. Stockholders' liability. Illegal dividends. Suits.*

A receiver of an insolvent corporation, when authorized by the court in which the receivership is pending, may sue at law and recover from stockholders dividends paid them by the corporation when insolvent. *Kretschmar* v. *Stone*, 375.

2. INSURANCE. *Fire insurance. Right to do business in state. Statutory provisions. Code* 1906, *ch.* 24. *Code* 1906, § 2564.

A mutual fire insurance company, having no capital stock, incorporated under ch. 24, Code 1906, and empowered to insure the property of its members only, cannot compel the issuance to it of a certificate of authority to carry on the insurance business generally, under Code 1906, § 2564, providing for the grant of such a certificate to qualified companies desiring to do a general insurance business in the state. *Farmers, etc., Co.* v. *Cole*, 508.

3. SAME. *Statutory right.*

The statutory right to transact business as an insurance company is the right to do a general business and not the restricted right of a mutual insurance company to insure its own members. *Ib.*

4. SLANDER. *Liability. Agents.*

A corporation is liable for slander uttered by its agent acting within the scope of his employment and in the performance of

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CORPORATIONS—*Continued.*

his duties touching the matter in question. *Rivers* v. *Yazoo, etc., R. R. Co.*, 196.

5. SLANDER. *Knowledge. Approval. Ratification.*

In such case it is unnecessary for a plaintiff to show that the slanderous words were spoken with defendant's knowledge or with its approval or that it ratified the act of the agent. *Ib.*

CO-TENANTS.

See TENANCY IN COMMON.

Beaman v. *Beaman*, 762.

COUNTY DISTRICTS.

See CHANCERY PLEADING AND PRACTICE, 2.

Bush v. *Quick*, 32.

COURTS.

SPECIAL TERMS. *Jurisdiction. Circuit Court. Special Term. Order. Entry on minutes. Code* 1906, § 988.

The failure of the clerk to enter on the minutes of a circuit court an order for a special term thereof, which was duly made and published, does not affect the validity of proceedings had at such term, though Code 1906, § 988, provides that such order shall be entered on the minutes as well as be made and published. *Ex parte Neil*, 518.

See CONSTITUTIONAL LAW, 3.

Yazoo, etc., R. R. Co. v. *Wallace*, 609.

CREDIBILITY OF WITNESSES.

See WITNESSES, 1.

Bell v. *State*, 104.

Smith v. *State*, 111.

CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

Kretschmar v. *Bank*, 363.

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Crimes—Criminal law and procedure.

CRIMES.

See MUNICIPALITIES, 2

Oakland v. *Miller*, 275.

CRIMINAL LAW AND PROCEDURE.

1. ABSENT WITNESS. *Affidavit. Effect of admission. Instructions. Testimony of accused. Credibility. Witness. Cross-examination. Evidence. Comment on failure of accused to testify.*

Upon the second trial of an accused charged with homicide, the defendant being the only witness to the killing in his behalf, it was error:—

(*a*) To permit the state to show that the defendant's absent witness was present but not introduced by him at the former trial, the state having agreed that the witness if present would testify as shown in an affidavit read to the jury; and

(*b*) To allow the state to ask defendant when testifying in his own behalf, whether he had testified in his previous trial; and, without reference to whether the trial be a first or other one,

(*c*) To instruct the jury at the instance of the state that they should, in weighing the evidence, take into consideration defendant's interest in the result of the trial; and

(*d*) To allow the state to show on cross-examination of a witness that he claimed a reward for arresting the accused. *Smith* v. *State*, 111.

2. AMENDMENT. *Indictment. Code* 1906, § 1509.

Where the prosecuting attorney, without leave of court and in disregard of Code 1906, § 1509, providing how indictments may be amended, changed the name of the party alleged to have been assaulted in an indictment for an assault with intent to kill and murder, defendant's motion to quash the amended indictment, the facts being shown, should have been sustained and its denial by the trial court constitutes reversible error. *Shurley* v. *State*, 415.

3. SAME. *How amendments made.*

An indictment can only be amended as provided by Code 1906, § 1509, regulating the subject and requiring an order on the minutes of the court specifying the amendment. *Ib.*

4. ARGUMENT OF COUNSEL. *Remarks of court. Memoranda on instruction. Homicide.*

On appeal from a conviction of manslaughter prejudicial error cannot be predicated of the fact:—

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

(*a*) That the trial court inquired in the hearing of the jury, it being proposed to introduce in evidence a garment worn by defendant when arrested, "How could the witness know it was not chicken blood on the garment?", the same not then having been identified and there being no evidence that it was bloody, or if bloody, where the blood came from, especially where the defendant subsequently testified that the garment was his and that it was stained with decedent's blood; or

(*b*) That the prosecuting attorney inadvertently made certain memoranda on the back of an instruction for the state which the jury had while deliberating on the case, it appearing that the jurors did not read the memoranda; or

(*c*) That the prosecuting attorney in his argument said—there being evidence of which to predicate the statements—that the accused was as guilty as he could be; that he was a bloody assassin; that accused was an athlete and sprang to his feet and shot deceased in the back of his head and then shot another person; that accused murdered decedent in cold blood, and called on the jury whether they would put a stop to the homicides of which three or four had been committed within the last few months by negroes, and that the proof showed that accused had not lived with his wife for two years. *Gray* v. *State*, 235.

5. ARSON. *Indictment. Two offenses in same count.*

An indictment which charges two distinct offenses, punishable by different terms of imprisonment, in the same count is demurrable. *State* v. *Freeman*, 315.

6. SAME. *Burning of house. Personalty therein.*

A count of an indictment averring that defendant burned a house and designated personalty therein charges two offenses. *Ib.*

7. ASSAULT WITH INTENT TO MURDER. *Deadly weapon. Indictment.*

An indictment for an assault and battery with intent to kill and murder, charging that the offense was committed with a deadly weapon, is not defective for failure to specify the particular weapon used. *Canterbury* v. *State*, 279.

8. SAME. *Altercation ended. New one.*

Defendants who, after an altercation has ended, follow a departing adversary and fall upon him, when they are in no danger real or apparent from him, and stab him with knives until restrained by others are guilty of assault and battery with intent to kill and murder. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

9. ASSAULT WITH INTENT TO MURDER. *Instructions.*

An instruction is erroneous and should be refused if there be no evidence of which to predicate it. *Canterbury* v. *State*, 279.

10. SAME. *Request for instruction. Court not to give without. Code* 1906, § 793.

In a prosecution for an assault and battery with intent to kill and murder the court is without authority under Code 1906, § 793, so providing, to give an instruction to the effect that the jury might find defendants guilty of a lesser constituent offense, in the absence of a request in writing to do so. *Ib.*

11. SAME. *Harmless error.*

It was not prejudicial error, where the evidence overwhelmingly showed a battery as well as an assault with intent to kill and murder, to instruct that the jury might convict of an assault and battery with intent to kill and murder, upon belief from the evidence that defendants were guilty of an assault with such intent. *Ib.*

12. CONSTITUTIONAL LAW. *Indictment. Conclusion. Constitution* 1890, *sec.* 169.

An indictment concluding, as required by Constitution 1890, sec. 169, "against the peace and dignity of the state," is properly concluded, although it contains two or more counts and the quoted words do not follow each count. *Starling* v. *State*, 255.

13. SAME. *Last count bad.*

In such case if the last count of the indictment be held bad on demurrer the conclusion remains and is applicable to each preceding count. *Ib.*

14. SAME. *Bill of particulars. Right to demand.*

A party will not be obliged to furnish facts already known to his adversary, nor will a bill of particulars be ordered when the means of obtaining the facts are equally accessible to both parties. *Ib.*

15. SAME. *Election of offenses by state. Code* 1892, § 1058.

Code 1892, § 1058, making an officer of an incorporated company who shall "embezzle or fraudulently secrete, conceal or convert to his own use, or make way with or secrete with intent to embezzle or convert to his own use," any property of the company which shall have been intrusted to his possession by virtue of his office, guilty of embezzlement, states the different forms of

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CRIMINAL LAW AND PROCEDURE—*Continued.*

embezzlement; and the state, on a trial of an indictment under the statute, may prove as many of the different acts of embezzlement as it is able to do, and all of the proof may be submitted to the jury, without requiring the state to elect any single act on which it will rely for a conviction. *Starling* v. *State*, 255.

16. CONSTITUTIONAL LAW. *Appeal. Harmless error.*

Where, on a trial for embezzlement in violation of Code 1892, § 1058, making an officer of an incorporated company, who shall embezzle or fraudulently secrete, conceal, or convert to his own use the goods of the company, guilty of embezzlement, it appeared clearly that accused was guilty of every act of embezzlement shown by the testimony, the error, if any, in refusing to require the state to elect on which act it would rely for a conviction, is not reversible. *Ib.*

17. CONTINUANCE. *Absence of witness.*

Where in a prosecution for murder the position of the body of the deceased when shot was material as determining the guilt or innocence of the accused, and there was no lack of diligence on his part to procure the attendance of the witness, the case should have been postponed on his application so as to secure the testimony of the person who was first upon the scene after the shooting and who placed the deceased in a bed before any one else arrived. *Watts* v. *State*, 757.

18. EMBEZZLEMENT. *Code* 1906, § 1136. *Indictment. Language of statute.*

An indictment of a bank officer for embezzling money belonging to the bank, predicated of Code 1906, § 1136, defining the crime, is sufficient if it charge the offense in the language of the statute. *Richburger* v. *State*, 806.

19. SAME. *Synonymous words.*

In such case, the offense being a statutory one, the indictment need not be drawn in the exact words of the statute, if words synonymous with those employed in the statute to define the crime be used. *Ib.*

20. SAME. *Care or possession.*

Under Code 1906, § 1136, making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession," an indictment charging that the defendant had the money under his care is sufficient, as would be one charging that he had the same in his "possession." *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

21. EMBEZZLEMENT. *Embezzlement of money. Amount. Value.*

An indictment for embezzling an amount of money need not charge the value of the money; the words "amount" and "value," when applied to money, are synonymous. *Richburger* v. *State*, 806.

22. SAME. *Under defendant's care. From whom received.*

An indictment for the embezzlement of money, charged to have been under defendant's care, is not objectionable for failing to charge from whom he received it. *Ib.*

23. SAME. *Appeal. Supreme court practice. Code* 1906, § 4936. *Questions not raised at trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, if not made a ground of special exception in the trial court, a conviction of a cashier of a bank for embezzlement from the bank will not be reversed because the indictment charged him as cashier, and not as a director, agent, clerk, servant, or officer of a corporation, where the objection is presented for the first time on appeal. *Ib.*

24. SAME. *Case. Indictment.*

The indictment, alleging that defendant on a specified day, being the cashier of a certain bank, a corporation chartered under the laws of Mississippi, did by virtue of his employment as such cashier have under his care of the property of the bank a large sum of money, which had come into his possession and had been intrusted to his care and keeping by virtue of his employment as such cashier, and did afterwards, without the consent of the bank, wilfully, unlawfully, fraudulently, and feloniously embezzle the same, and fraudulently and feloniously convert it to his own use, in the absence of an objection in the trial court that he was charged as a cashier and not as a director, agent, clerk, servant or officer of the bank, sufficiently charged the crime of embezzlement as defined by Code 1906, § 1136. *Ib.*

25. SAME. *Application for continuance.*

An application for a continuance, failing to show that defendant had knowledge that he could prove the matters stated, is insufficient. *Ib.*

26. SAME. *Other evidence. Admissions to prevent continuance.*

The denial of a continuance asked for by a defendant because of the absence of a witness does not constitute reversible error where the state admitted that the witness, if present, would

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

testify as claimed and the testimony related largely to matters provable by writings easily accessible, and some of them were actually introduced. *Richburger* v. *State*, 806.

27. EMBEZZLEMENT. *Amendment of indictment. Code* 1906, § 1509. *Order on minutes. Entry nunc pro tunc.*

An order of court actually made, under Code 1906, § 1509, regulating the subject, authorizing the amendment of an indictment, may be entered on the minutes of the court, from which inadvertently omitted, after the conviction of defendant and upon the hearing of a motion for a new trial or other motion predicated of the omission. *Ib.*

28. SAME. *Code* 1906, § 4936. *Objections not made on trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, unless made a ground of special exception at the trial, an objection that an indictment was amended without entry on the minutes of the order allowing it, as required by Code 1906, § 1509, cannot be heard the first time on appeal. *Ib.*

29. SAME. *Indictment. Variance. Name.*

Where a bank from which money was alleged to have been embezzled by defendant was chartered as the "Jonestown Bank of Jonestown," and the indictment designated it as the "Jonestown Bank," the variance was immaterial. *Ib.*

30. SAME. *Bill of particulars. Appeal. Discretion. Review.*

Whether the trial court should grant or deny an application for a bill of particulars being within its discretion, the overruling of accused's objection to a bill of particulars furnished under the court's order, which proved unsatisfactory, will not be reviewed on appeal, unless a gross abuse of discretion be shown. *Ib.*

31. SAME. *Prejudice.*

Where, in a prosecution for embezzlement, the state was required to elect on which items of the charges it would base its demand for a conviction, and it elected two items of the same date, accused was not prejudiced by the court's refusal to require a bill of particulars furnished to be made more certain. *Ib.*

32. SAME. *Election.*

Where the evidence so far failed to establish embezzlement in one of two transactions occurring on the same day, which were elected by the state to support a conviction, that no reasonable

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CRIMINAL LAW AND PROCEDURE—*Continued.*

person would have believed the conviction was based on it, accused was not prejudiced by the fact that the state was allowed to elect two items of the charges, instead of being limited to a single item. *Richburger* v. *State*, 806.

33. EMBEZZLEMENT. *New trial. Hearing. Code* 1906, § 801.

Under Code 1906, § 801, providing that, when a motion for a new trial shall be granted or refused, either party may reduce to writing the reasons offered for the new trial, etc., and tender same as a bill of exceptions, which shall be signed by the trial judge, on which error may be assigned, the circuit court, on the hearing of a motion by accused for a new trial, is only required to consider the reasons assigned therefor in writing. *Ib.*

34. SAME. *Assignment of grounds.*

A general complaint that the court erred in admitting illegal, incompetent, and irrelevant evidence, or refusing to admit legal, competent and relevant evidence, is insufficient. *Ib.*

35. SAME.

A motion for a new trial for erroneous rulings in the admission or rejection of evidence should designate each of the particular rulings complained of, and make such specific reference to the evidence as will clearly disclose to the trial judge the rulings questioned. *Ib.*

36. SAME. *Reference to bill of exceptions.*

A motion for a new trial, which refers to the evidence as contained in the bill of exceptions, or other writing not filed when the motion was acted on, though filed thereafter, is too indefinite, and presents no question concerning the evidence for review. *Ib.*

37. SAME.

Objections in a motion for a new trial that the court erred in admitting incompetent evidence for the state over objections and exceptions of accused, and in excluding competent evidence offered by accused, are insufficient. *Ib.*

38. SAME. *Construction. Presumption.*

A court is not bound to help out a defective motion for a new trial by construction or supposition. *Ib.*

39. SAME. *Evidence. Admissions against interest.*

Declarations by accused, which are admissions against interest, are admissible. *Ib.*

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CRIMINAL LAW AND PROCEDURE—*Continued.*

40. EMBEZZLEMENT. *Voluntary confessions.*

Declarations by accused, which constituted voluntary confessions, are admissible. *Richburger* v. *State*, 806.

41. SAME. *Money. Credits.*

The conviction of the cashier of an insolvent bank for embezzling its money will not be vacated as unwarranted where, his accounts being largely overdrawn and knowing it could not make him an unsecured loan, he, while absent from the bank, issued his check on it for five hundred dollars, and, being in the bank when several checks, including it, were presented for payment by a collector, executed to the collector the bank's check for the aggregate sum of all of them, drawn upon a trust company in which the bank had a deposit and which was paid in money upon presentation. *Ib.*

42. SAME. *Defenses. Deposits.*

Where the cashier of a bank in failing circumstances misappropriated five hundred dollars of its funds, his account being largely overdrawn, it was no defense to a prosecution for embezzlement that he deposited to his general account after misappropriation five hundred and four dollars, since, under the rule of appropriation of payments, such deposit was properly applied to the former overdraft. *Ib.*

43. SAME. *Venue. Offense committed partly in two states. Code* 1906, §§ 1404, 1405.

Where the cashier of a bank misappropriated its funds on deposit in a bank in another state by means of checks, one drawn in this state and one in the other, he may be indicted for embezzlement in this state, under Code 1906, §§ 1404, 1405, providing that where an offense is begun out of this state and consummated in it or is begun within the state and consummated out of it the prosecution may be had in the state where begun or consummated. *Ib.*

44. SAME. *Misconduct of counsel. Argument.*

The trial court should not hesitate of its own motion to prevent counsel for the state from abusing his right to argue the cause to the jury. *Ib.*

45. SAME. *Appeal. Objection not made at trial.*

Misconduct of counsel cannot be reviewed, where accused made no objection thereto at the time, nor until after verdict. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

46. EVIDENCE. *Admissions.*

In a prosecution for homicide the statement of the decedent, being neither a part of the *res gestæ* nor a dying declaration, although made shortly after the fatal encounter and in the hearing of the defendant, is not admissible in evidence if defendant did not assent to it by silence or otherwise. *Johnson* v. *State*, 317.

47. SAME. *Best evidence.*

In a trial for perjury, charged to have been committed before a justice of the peace court in the trial of one charged with crime, it is incompetent to prove by the justice of the peace the contents of the affidavit on which the prosecution before him was based; the record being the best evidence. *Davis* v. *State*, 56.

48. SAME. *Character of injured party.*

The state cannot show the good character of the party assaulted in a prosecution for the assault where his character was not attacked. *Woods* v. *State*, 245.

49. SAME. *Circumstantial. Instruction.*

Circumstantial evidence is inferior to the testimony of eyewitnesses, and it is error to instruct in a murder trial, where the evidence for the defense would prove an alibi, if credited, that it is as good as any other kind of evidence and that whenever it generates full conviction of guilt beyond a reasonable doubt, the jury should act on such evidence as readily as on any other. *Haywood* v. *State*, 461.

50. SAME.

Where the accused in a prosecution for murder resting entirely on circumstantial evidence has introduced testimony which would prove an alibi, if credited, it is error not to admit evidence to the effect that disreputable characters in whose company the deceased had been on the night of his death left the state on the following day. *Ib.*

51. SAME. *Exhibits. Experts.*

Where the condition of decedent's skull at the time of his death was a material enquiry, the testimony of experts who did not see it until disinterred two years afterwards and the skull itself were inadmissible in evidence, where it had decayed to such an extent that the witnesses could not do more than speculate touching its condition at the time in question. *Self* v. *State*, 58.

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

52. EVIDENCE. *Memorandum at preliminary trial.*

Where the conservator of the peace, before whom a defendant charged with crime had a preliminary trial, made at the time a memorandum of the evidence taken on that trial which he knows to be correct, though not signed by him nor certified as a part of the record, the state may have him testify from the same touching the testimony then delivered by a defendant's witness in order to discredit her, although he have no independent recollection of what she swore before him. *Bell* v. *State*, 104.

53. FORGERY. *Code* 1892, § 1108. *Indictment.*

An indictment, under Code 1892, § 1108, providing that the making with intent to defraud, of a false entry in any book of accounts kept by a moneyed corporation to be, or intended to be, delivered to a person dealing with the corporation, by which any pecuniary obligation is affected, shall be guilty of forgery, is insufficient if it fail to show how a pecuniary obligation was to be affected. *State* v. *Starling*, 252.

54. SAME. *Indictment. Demurrer. Waiver. Supreme court practice.*

On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the court below. *Sherrod* v. *State*, 856.

55. SAME. *Evidence. Witnesses. Contradiction.*

In a prosecution for forging a promissory note, the defense being that the note was genuine and given for money loaned by defendant, if the prosecutrix be permitted to testify, it appearing that she received from defendant a sum of money equal to the amount of the note, that as an officer of an insurance company defendant collected an insurance policy for a greater sum on the life of her deceased husband and that the money received was a partial payment on that account, it will be error to refuse defendant's offer to show (a) that he was not an officer of the insurance company, (b) had never made collection of the insurance mentioned, and (c) that nothing was ever due on the policy, it having lapsed before the death of the insured. *Ib.*

56. SAME.

Where in such case the prosecutrix testified that defendant was indebted to her, the defendant, being a witness in his own behalf, should not be prohibited from testifying that he was not so indebted. *Ib.*

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

57. FORGERY.

Where in such a prosecution for forgery the prosecutrix testified that she was not indebted to defendant but that he was indebted to her on the proceeds of insurance on the life of her deceased husband, it was error, proper predicate having been laid, to refuse to allow defendant to show that she had stated that her husband failed to pay premiums and the policy had lapsed before his death and that she owed defendant the amount of the note. *Sherrod* v. *State*, 856.

58. HOMICIDE. *Assault with intent to murder. Instructions. Deliberation. Use of weapon.*

In a prosecution for an assault with intent to murder, instructions authorizing a conviction as charged "even if the blow was struck with a single-barreled shotgun without malice" and announcing that "the law presumes malice from the unlawful and deliberate use of a deadly weapon," are erroneous as justifying an inference that the judge thought there was unlawful and deliberate use of the loaded gun as a deadly weapon, although it was not fired. *Woods* v. *State*, 245.

59 SAME. *Instructions. Manslaughter.*

An instruction predicated of an assumption that defendant was excusable for firing two fatal shots into the body of the deceased, but seeking a conviction of manslaughter because of the firing of subsequent shots, should not be given in the absence of all evidence that the subsequent shots shortened the life of the deceased. *Williams* v. *State*, 319.

60. SAME.

In cases of homicide the right of self-defense should not be narrowed by instructions for the state for which there is no predicate in the evidence. *Ib.*

61. JURY. *Selection. Code* 1892, § 2389.

Where officers charged with the duty of selecting juries poured the slips of paper containing the names of the qualified jurors from the jury boxes and read and selected such as they wished, instead of drawing them by lot from the boxes, the selection was illegal and the panel should have been quashed, notwithstanding Code 1892, § 2389, declaring all laws relating to the selection of juries to be directory. *Cook* v. *State*, 137.

62. SAME. *Harmless error.*

Where in a murder case, after the exhaustion of the special venire,

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Criminal law and procedure.

CRIMINAL LAW AND PROCEDURE—*Continued.*

the court, on motion of defendant, directed the sheriff to call bystanders, not of the regular panel for the week, and none of said panel served on the case, the accused cannot complain, after conviction, of irregularities in its selection. *Cook* v. *State*, 137.

63. JURY. *Selection of juries. Procedure. Laws* 1896, *ch.* 84, *p.* 93.

Where the supervisors of a county prepared at its first meeting in the year a list of persons to serve as jurors in the circuit court and the names of the jurors for the different supervisors' districts were placed in separate boxes, without tops, and these were placed in a larger box with a sliding top, sealed with a paper cover, and the box was kept locked, the jury box was prepared in substantial compliance with Laws 1896, p. 93, ch. 84, providing that the names of the persons selected to serve as jurors from each supervisor's district shall be put in a separate box, which shall be kept sealed, etc., especially in view of Code 1892, § 2389, declaring that the provisions of law relating to the drawing of juries are directory. *Ib.*

64. SAME. *Drawing on wrong day.*

The preparing of a jury list for a term of court by the proper officers more than fifteen days before the commencement of the term, though the law provides that the selection shall be made within fifteen days of the opening of the term, is an irregularity, and does not warrant the quashing of the panel, under Code 1892, § 2389, providing that the provisions of the law in relation to the drawing of juries are directory. *Ib.*

65. SAME. *Prejudicial error.*

Where unfairness in the method of securing jurors is shown, a substantial right of a litigant is invaded, and the supreme court will set aside the verdict of such a jury on timely objection being made, notwithstanding Code 1892, § 2389, which provides that the provisions of the law in relation to the drawing of juries are directory. *Ib.*

66. SAME. *Quashing jury box. Grounds. Sufficient evidence.*

To warrant the court in quashing a jury box, it is not enough to show that it would be possible for names to be substituted for the list prepared by the supervisors, as required by Laws 1896, p. 93, ch. 84, but the testimony must show that a fraud was committed, or such flagrant violations of the jury laws as constitute fraud in law. *Ib.*

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Criminal law and procedure—Cross-examination.

CRIMINAL LAW AND PROCEDURE—*Continued.*

67. JURY. *Qualifications of jurors. Code* 1892, § 2355.

A juror, stating on his *voir dire* that he can try the case fairly and impartially according to the law and the evidence, and that his only information consists of what persons have told him, is a competent juror, within Code 1892, § 2355, making a person who will make oath that he is impartial in the case competent as a juror, notwithstanding his having an opinion. *Cook* v. *State*, 137.

68. SAME.

Where the jury for the term was drawn in violation of the statute, but without purpose on the part of the officers drawing the same to disqualify from jury service the persons drawn, and where accused demanded a special venire, which was granted, and drawn from the jury box containing the list of persons selected by the supervisors to serve as jurors, the refusal to quash the jury box was not prejudicial to accused. *Ib.*

69. LARCENY. *Affidavit. Separate articles. Different owners.*

An affidavit charging petit larceny is not vitiated by averring the articles of property stolen to belong to different owners; but on the trial in such case the state would be compelled to show a single asportation. *Ward* v. *State*, 249.

70. RECEIVING STOLEN PROPERTY. *Indictment. Description of goods.*

It is essential in an indictment for receiving stolen property to describe the property with the same particularity as is required in an indictment for larceny. *Wells* v. *State*, 516.

71. SUNDAY. *Desecration. Fruit stand. Code* 1906, § 1367. *Merchant.*

The keeper of a fruit stand is a "merchant, shopkeeper or other person" within the meaning of Code 1906, § 1367, prohibiting the keeping open of stores on Sunday for the purpose of disposing of any wares, merchandise, goods or chattels. *Gulfport* v. *Stratakos*, 489.

72. SAME. *Necessity. Charity. Merchandise.*

The sale of fruit is not a work of necessity or charity; and fruit is merchandise within the meaning of the Sunday law. *Ib.*

CROSS-EXAMINATION.

See CRIMINAL LAW AND PROCEDURE, 1, (*d*).

Smith v. *State*, 111.

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DAMAGES.

1. BONDS. *Penalty. Liquidated damages. United States mail. Subcontractor.*

A bond given to a contractor by a subcontractor to secure the carrying of the United States mail between designated points, with a stipulation that the amount should be deemed as liquidated damages, is nevertheless penal and only actual damages can be recovered for its breach. *Croker* v. *Brevard*, 64.

2. EMINENT DOMAIN. *Railroad construction. Damages.*

In estimating damages to result from the construction of a railroad through a farm, it is improper to consider as an element of damage, either:—

(*a*) That laborers on the farm would likely stop work and look at passing trains; or

(*b*) That the mules in use on the farm would likely run away as trains approached; or

(*c*) That deleterious grasses might be scattered over the land; or

(*d*) That live stock getting upon the track would likely be killed by the trains. *Yazoo, etc., R. R. Co.* v. *Jennings*, 93.

3. SAME. *Excessive award. Case.*

Facts of the case considered and verdict adjudged excessive. *Ib.*

4. MEASURE. *Loss of property. No market value. Hotelkeeper. Guest.*

Where a guest's personal property, having no market value, was lost by the negligence of a hotelkeeper, in whose custody it had been placed, his liability is more than nominal; a recovery may be had for the monetary value of the property to the guest. *Austin* v. *Millspaugh*, 354.

5. RAILROAD. *Ejection. Punitive damages.*

The original purchaser of a return railroad ticket, if ejected by the conductor because the selling agent had erroneously punched his ticket for a female instead of a male, can recover both actual and punitive damages where the conductor, saying "This is a bogus ticket," ejected him without giving him an opportunity to explain. *Illinois, etc., R. R. Co.* v. *Gortikov*, 787.

DEADLY WEAPONS.

CRIMINAL LAW AND PROCEDURE. *Assault with intent to murder. Indictment.*

An indictment for an assault and battery with intent to kill and

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DEADLY WEAPONS—*Continued.*

murder, charging that the offense was committed with a deadly weapon, is not defective for failure to specify the particular weapon used. *Canterbury* v. *State*, 279.

DEATH.

See RAILROADS.

Jones v. *Yazoo, etc., R. R. Co.*, 547.

DEEDS.

1. LAND AND CONVEYANCES. *Code* 1892, § 2436. *Succession of donees.*

Under Code 1892, § 2436, so providing it is competent by deed to convey lands to a succession of living donees, not exceeding two, and to the heirs of the body of the remainderman, and in default thereof to the right heirs of the donor in fee simple. *Brinson* v. *Sandifer*, 41.

2. RAILROADS. *Right of way. Release of damages. Construction. Surface water. Change of grade.*

A deed conveying to a railroad company for a right of way land in a street upon which it had already constructed and was operating tracks, reciting that the grantors "released the company from any and all damages, whether past, present or future, for the construction and operation of the tracks," does not release the company from damages resulting from a flow of surface water caused by the railroad company elevating the grade of the street and of its tracks. *Yazoo, etc., R. R. Co.* v. *Smith*, 44.

3. TIMBER. *Time limit.*

The grantee in a deed conveying timber and giving a limited time to remove the same, has no right after the expiration of the time to enter upon the land even to remove logs previously cut. *Clark* v. *Ingram-Day, etc., Co.*, 479.

4. UNDUE INFLUENCE. *Fairness of transaction. Burden of proof.*

A deed executed by an infirm and feeble-minded person for an inadequate consideration will be cancelled by a court of equity in the absence of evidence showing the fairness of the transaction and the grantor's capacity to make the deed. *Leach* v. *Hirshman*, 723.

5. VENDOR AND VENDEE. *Lien. Recited consideration. Actual consideration.*

A grantor who conveys land on the promise of a representative of

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DEEDS—*Continued.*

the grantee to pay an agreed consideration can enforce his lien thereon for the agreed price though his deed recites a less price. *Matthews* v. *Delta, etc., R. R. Co.*, 429.

6. WILLS. *Construction. Will or deed.*

A writing, not attested as a will, but acknowledged as a deed, conveying a life estate, followed by the words "I will" a second life estate to a daughter, and providing that after the death of the daughter the property "goes to her children and their heirs and assigns forever," is not a will but a deed to the second life estate as well as to the first one. *Brinson* v. *Sandifer*, 41.

DEEDS OF TRUST.

1. FORECLOSURE SALE. *Constitution* 1890, sec. 111; *Code* 1892, § 2443. *Bulk sales.*

The lump sale under a mortgage or deed of trust of a four-hundred acre tract of land is void if made in violation of Constitution 1890, sec. 111, providing for the sale of lands, under decrees and executions in subdivisions not exceeding one hundred and sixty acres, as extended to sales under mortgages and deeds of trust by Code 1892, § 2443. *McClusky* v. *Trussel*, 544.

2. EQUITY. *Injunction. Action at law. Unconscionable advantage. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred. *Wall* v. *Harris*, 671.

3. TRUSTEE'S SALE. *Inadequacy of price.*

A sale of land made by a trustee in a deed of trust, otherwise valid, will not be set aside for mere inadequacy of price, unless it be so great as to shock the conscience. *Weyburn* v. *Watkins*, 728.

4. SAME. *Notices of sale. Defects. Date.*

Notices of a trustee's sale, complying with the terms of the trust deed and the law, which clearly and properly give the time, terms and place of sale, are not invalidated by an erroneous date written under them. *Ib.*

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DEEDS OF TRUST—*Continued.*

5. TRUSTEE'S SALE. *Principal and surety.*

The right to sell existing, a surety cannot complain of a trustee's sale of lands any more than a principal debtor. *Weyburn* v. *Watkins*, 728.

DELAYAGE.

See DEMURRAGE.

Yazoo, etc., R. R. Co. v. *Keystone, etc., Co.*, 391.

DELIVERY.

See FRAUDS, STATUTE OF, 2.

Ladnier v. *Ladnier*, 475.

DEMURRAGE.

CARRIERS. *Railroads. Railroad commission. Rules. Delayage. Powers.*

Under Code 1892, § 4291, giving the railroad commission power to fix charges and supervise persons owning or operating express, telegraph, telephone or sleeping car companies, and Laws 1898, p. 97, ch. 82, extending all laws authorizing the commission to supervise common carriers to car service associations:—

(*a*) The railroad commission had power to make rules as to reciprocal demurrage; and

(*b*) The rule of the commission is valid which provides that when cars are properly loaded and shipper's instructions given, the railroad company must immediately issue bills of lading to the shipper, making the company liable to a penalty of one dollar per day in the owner's favor for delay in starting the shipment, after twenty-four hours following the issuance of the bill of lading. *Yazoo, etc., R. R. Co.* v. *Keystone, etc., Co.*, 391.

DEMURRER.

CRIMINAL LAW AND PROCEDURE. *Indictment. Waiver. Supreme court practice.*

On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the court below. *Sherrod* v. *State*, 856.

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Descent and distribution—Ejection from train.

DESCENT AND DISTRIBUTION.

STATUTORY CONSTRUCTION. *Code* 1892, §§ 1545, 4496.

Code 1892, §§ 1545, 4496, the one section regulating the descent of property between husband and wife and the other providing for the renunciation of a will by the widow of the testator, must be construed together, and the word "child" as used in the former means such child as shall have a right under the law to share in the estate of his intestate father, and does not include children who have contracted away the right. *Norfleet* v. *Callicott*, 221.

DESCRIPTION.

See CRIMINAL LAW AND PROCEDURE, 70.

Wells v. *State*, 516.

See PASSENGERS, 3, 4, 5.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

DISTURBING THE PEACE.

EQUITY JURISPRUDENCE. *Injunction. Criminal prosecutions. Megaphone.*

Equity will not enjoin the making of affidavits against a merchant and the arresting and fining him for alleged disturbances of the peace in using a megaphone to call attention to a clearance sale; there being in a just sense no property right involved and his rights, whatever they be, are determinable in the law courts. *Pleasants* v. *Smith*, 440.

DIVIDENDS.

See CORPORATIONS, 1.

Kretschmar v. *Stone*, 375.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 8.

Gulf, etc., R. R. Co. v. *Adams*, 559.

EJECTION FROM TRAIN.

See RAILROADS, 10, 11.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

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ELECTION.

See CRIMINAL LAW AND PROCEDURE, 15, 32.

Starling v. *State*, 255.

Richburger v. *State*, 806.

ELECTIONS, PRIMARY.

See PRIMARY ELECTIONS, 1, 2.

Ramey v. *Woodward*, 777.

State ex rel. v. *Brown*, 876.

EMBEZZLEMENT.

See CRIMINAL LAW AND PROCEDURE, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45.

Richburger v. *State*, 806.

Starling v. *State*, 255.

EMINENT DOMAIN.

1. DELEGATION OF POWER. *Foreign Telephone Company. Code* 1906, §§ 925, 929, 1876.

Under Code 1906, §§ 925, 929, providing that all telephone companies may set up their posts and fixtures along and across railroad tracks and exercise the power of eminent domain for the purpose of constructing new lines, a foreign telephone company has the right of eminent domain to secure a right of way along a railroad's right of way, although Code 1906, § 1876, provides that telephone companies "chartered under the laws of this state" may by condemnation acquire a right of way "across" railroads. *Cumberland, etc., Co.* v. *Railroads*, 686.

2. SAME. *New line. What is.*

A direct telephone line between two cities, along a route not previously occupied by the company, is a new line, within the meaning of Code 1906, § 929, empowering telephone companies to exercise the power of eminent domain for the purpose of constructing new lines, although the company has an indirect line between the same cities. *Ib.*

3. RAILROAD CONSTRUCTION. *Damages.*

In estimating damages to result from the construction of a railroad through a farm, it is improper to consider as an element of damage, either:—

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EMINENT DOMAIN—*Continued.*

(*a*) That laborers on the farm would likely stop work and look at passing trains; or

(*b*) That the mules in use on the farm would likely run away as trains approached; or

(*c*) That deleterious grasses might be scattered over the land; or

(*d*) That live stock getting upon the track would likely be killed by the trains. *Yazoo, etc., R. R. Co.* v. *Jennings*, 93.

4. RAILROAD CONSTRUCTION. *Excessive award. Case.*
Facts of the case considered and verdict adjudged excessive. *Ib.*

EMPLOYE.

See RAILROADS, 1.
Coleman v. *Yazoo, etc., R. R. Co.*, 629.

EQUITY.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 109. *Injunctions. Persons in pari delicto. Municipalities. Contracts. Officers. Purchase of supplies.*
Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply. *Noxubee, etc., Co.* v. *Macon*, 636.

2. CRIMINAL PROSECUTION. *Injunction. Disturbing peace. Megaphone.*
Equity will not enjoin the making of affidavits against a merchant and the arresting and fining him for alleged disturbances of the peace in using a megaphone to call attention to a clearance sale; there being in a just sense no property right involved and his rights, whatever they be, are determinable in the law courts. *Pleasants* v. *Smith*, 440.

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Equity.

EQUITY—*Continued.*

3. HOMESTEAD. *Inheritance. Right of widow. Equitable title. Code* 1871, § 1956.

Under Code 1871, § 1956, providing that property exempted by law from sale under execution shall on the death of the owner descend to his widow and children as tenants in common, the widow and children of the equitable owner of lands constituting his homestead at his death jointly and equally inherited the same in fee simple. *Warren* v. *Davis*, 336.

4. JUDGMENTS. *Default. Injunction. Case.*

An equity suit to enjoin a judgment rendered by default against complainant as a nonresident defendant in an attachment at law, is maintainable where (*a*) defendant was without notice of the suit until after the judgment became final, (*b*) his post-office address was well known to the plaintiff in attachment, (*c*) and he would have received the notice had it been mailed him; and where (*d*) proof of publication was not on file when the judgment was rendered, (*e*) no entry in the records showed that a notice had been mailed to defendant and (*f*) the clerk was unable to testify that it was mailed. *Oliver* v. *Baird*, 718.

5. SAME. *Negligence. Judgment. Injunction.*

Equity will not aid the negligent by enjoining the collection of an erroneous judgment at the instance of a defendant therein who failed to avail of a full, adequate, and complete legal remedy for its correction. *Gum Carbo Co.* v. *New Orleans, etc., Gazette*, 177.

6. MORTGAGES. *Satisfaction. Subrogation.*

A party to a void marriage who, honestly believing that he is the husband of the other party thereto, on her verbal promise to convey him a half interest in the property, satisfies a mortgage on her land, is a mere volunteer and not entitled to be subrogated to the rights of the mortgagee. *Brown* v. *Brown*, 410.

7. NAVIGABLE WATERS. *Obstructions. Remedies. Pleadings.*

A bill in equity to compel the removal of obstructions to the navigation of a stream created by a railroad company is not demurrable if it show that complainant has a special statutory exclusive right for a term of years to navigate the stream and that the defendant has constructed railroad bridges across it in such a way as to needlessly obstruct navigation and had thereby interfered with complainant's enjoyment of its exclusive right. *Silver Creek, etc., Co.* v. *Yazoo, etc., R. R. Co.*, 345.

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Equity—Estoppel.

EQUITY—*Continued.*

8. TENDER. *Partition.*

A defendant in a partition suit, who by his answer claims a greater interest in partnership lands than the complainant, his copartner, concedes to be his, should not be denied his share as claimed because of his failure to pay into the court a balance due on his contribution to the joint purchase when by his answer and testimony he denies knowledge of the amount of such balance and alleges his readiness to pay the same when ascertained and previous offers by him so to do. *Peirce* v. *Halsell*, 171.

9. VENDOR AND VENDEE. *Lien. Purchase money. Erection of plant. Payment out of gross receipts.*

The lien of a vendor of land for a fixed part of the unpaid purchase money is not affected by a provision in the deed that payment is to be made out of the gross receipts of a manufactory to be erected on the land by the vendee, which was never in fact erected. *Burroughs* v. *Gilliland*, 127.

10. SAME. *Practice. Conflict between bill and exhibits.*

A conflict between some of the allegations of a bill of complaint and the exhibits thereto is not fatal on demurrer if the other allegations and exhibits present a good case. *Ib.*

11. UNCONSCIONABLE ADVANTAGE. *Injunction. Action at law. Deed of trust. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin in an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred by the statute of limitations. *Wall* v. *Harris*, 671.

ESTATES OF DECEDENTS.

See WILLS, 2, 3, 4, 5, 6.
Norfleet v. *Callicott*, 221.

ESTOPPEL.

MUTUAL BENEFIT SOCIETY. *Forfeitures. Mala fides.*

A mutual benefit society may be estopped by conduct to the same extent as a natural person, and a forfeiture of an insurance pol-

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ESTOPPEL—*Continued.*

icy will not be adjudged in its favor where the insured acted in good faith and paid all the dues required and the society was not injured by any act of his. *Morgan* v. *Independent Order, etc.*, 864.

EVIDENCE.

1. ABSENT WITNESS. *Affidavit. Effect of admission. Instructions. Testimony of accused. Credibility. Witness. Cross-examination. Comment on failure of accused to testify.*

Upon the second trial of an accused charged with homicide, the defendant being the only witness to the killing in his behalf, it was error:—

(*a*) To permit the state to show that the defendant's absent witness was present but not introduced by him at the former trial, the state having agreed that the witness if present would testify as shown in an affidavit read to the jury; and

(*b*) To allow the state to ask defendant when testifying in his own behalf, whether he had testified in his previous trial; and, without reference to whether the trial be a first or other one,

(*c*) To instruct the jury at the instance of the state that they should, in weighing the evidence, take into consideration defendant's interest in the result of the trial; and

(*d*) To allow the state to show on cross-examination of a witness that he claimed a reward for arresting the accused. *Smith* v. *State*, 111.

2. ADMISSIONS.

In a prosecution for homicide the statement of the decedent being neither a part of the *res gestæ* nor a dying declaration, although made shortly after the fatal encounter and in the hearing of the defendant, is not admissible in evidence if defendant did not assent to it by silence or otherwise. *Johnson* v. *State*, 317.

3. SAME. *To prevent continuance.*

The denial of a continuance asked for by a defendant because of the absence of a witness does not constitute reversible error where the state admitted that the witness, if present, would testify as claimed and the testimony related largely to matters provable by writings easily accessible, and some of them were actually introduced. *Richburger* v. *State*, 806.

4. BEST EVIDENCE.

In a trial for perjury, charged to have been committed before a

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Evidence.

EVIDENCE—*Continued.*

justice of the peace court in the trial of one charged with crime, it is incompetent to prove by the justice of the peace the contents of the affidavit on which the prosecution before him was based; the record being the best evidence. *Davis* v. *State*, 56.

5. CHARACTER OF INJURED PARTY.

The state cannot show the good character of the party assaulted in a prosecution for the assault where his character was not attacked. *Wood* v. *State*, 245.

6. CIRCUMSTANTIAL EVIDENCE. *Instruction.*

Circumstantial evidence is inferior to the testimony of eyewitnesses, and it is error to instruct in a murder trial, where the evidence for the defense would prove an alibi, if credited, that it is as good as any other kind of evidence and that whenever it generates full conviction of guilt beyond a reasonable doubt, the jury should act on such evidence as readily as on any other. *Haywood* v. *State*, 461.

7. SAME. *Murder. Evidence.*

Where the accused in a prosecution for murder resting entirely on circumstantial evidence has introduced testimony which would prove an alibi, if credited, it is error not to admit evidence to the effect that disreputable characters in whose company the deceased had been on the night of his death left the state on the following day. *Ib.*

8. CONFESSIONS.

Declarations by accused, which constituted voluntary confessions, are admissible. *Richburger* v. *State*, 806.

9. CONTRACTS. *Performance. Acceptance by architect. Fraud. Pleading.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising architect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and

(*b*) Evidence that the architect acted fraudulently, or made such mistake is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful. *Standard, etc., Co.* v. *Brantley, etc., Co.*, 16.

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Evidence.

EVIDENCE—*Continued.*

10. DECLARATIONS. *Against interest.*

Declarations by accused, which are admissions against interest, are admissible. *Richburger* v. *State*, 806.

11. EXHIBITS. *Experts.*

Where the condition of decedent's skull at the time of his death was a material enquiry, the testimony of experts who did not see it until disinterred two years afterwards and the skull itself were inadmissible in evidence, where it had decayed to such an extent that the witnesses could not do more than speculate touching its condition at the time in question. *Self* v. *State*, 58.

12. FORGERY. *Witnesses. Contradiction.*

In a prosecution for forging a promissory note, the defense being that the note was genuine and given for money loaned by defendant, if the prosecutrix be permitted to testify, it appearing that she received from defendant a sum of money equal to the amount of the note, that as an officer of an insurance company defendant collected an insurance policy for a greater sum on the life of her deceased husband and that the money received was a partial payment on that account, it will be error to refuse defendant's offer to show (a) that he was not an officer of the insurance company, (b) had never made collection of the insurance mentioned, and (c) that nothing was ever due on the policy, it having lapsed before the death of the insured. *Sherrod* v. *State*, 856.

13. SAME.

Where in such case the prosecutrix testified that defendant was indebted to her, the defendant, being a witness in his own behalf, should not be prohibited from testifying that he was not so indebted. *Ib.*

14. SAME.

Where in such a prosecution for forgery the prosecutrix testified that she was not indebted to defendant but that he was indebted to her on the proceeds of insurance on the life of her deceased husband, it was error, proper predicate having been laid, to refuse to allow defendant to show that she had stated that her husband failed to pay premiums and the policy had lapsed before his death and that she owed defendant the amount of the note. *Ib.*

15. INSURANCE. *Fire policy. Fireproof safe clause.*

A merchant, having a policy of fire insurance on his merchandise conditioned on his keeping books showing the status of his busi-

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EVIDENCE—*Continued.*

ness and requiring him to deposit them in a fireproof safe when the store was not open for business, failed to comply with the policy when he changed his system of bookkeeping, used new books, which brought forward only the footings of the old ones, and did not keep the old books in a fireproof safe, whereby they were destroyed in the fire which burned up the merchandise. *Ætna, etc., Co.* v. *Mount*, 642.

16. JUDICIAL SALE. *Setting aside. Fraud.*

A judicial sale will not be vacated on the charge that the purchaser fraudulently induced prospective purchasers not to bid against him for the property in the absence of clear, convincing and satisfactory evidence of the fraud. *Locke* v. *Keiler*, 3.

17. JURY BOX. *Quashing. Grounds. Sufficient proof.*

To warrant the court in quashing a jury box, it is not enough to show that it would be possible for names to be substituted for the list prepared by the supervisors, as required by Laws 1896, p. 93, ch. 84, but the testimony must show that a fraud was committed, or such flagrant violations of the jury laws as constitute fraud in law. *Cook* v. *State*, 137.

18. PRELIMINARY TRIAL. *Memorandum.*

Where the conservator of the peace, before whom a defendant charged with crime had a preliminary trial, made at the time a memorandum of the evidence taken on that trial which he knows to be correct, though not signed by him nor certified as a part of the record, the state may have him testify from the same touching the testimony then delivered by a defendant's witness in order to discredit her, although he have no independent recollection of what she swore before him. *Bell* v. *State*, 104.

19. TAXATION. *Abatement sales. Land sales, etc.*

A tax sale to the state under the Abatement Act can not be maintained without independent evidence that by reason of its delinquency for taxes of years prior to 1874 the land belonged to the class contemplated by the act, the mere production of the sales list, to the state and the state's deed to the claimant being insufficient. *Kennedy* v. *Sanders*, 524.

20. SAME. *Delinquency. Evidence. Assessment roll.*

An assessment of land to the state shown by a roll filed August 5, 1875, is imputable to a sale to the state that occurred on May 5,

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EVIDENCE—*Continued.*

1875, and not to a sale in 1874 for the taxes of 1873, or to some earlier sale. *Kennedy* v. *Sanders*, 524.

21. TAXATION. *Tax sale. Method. Evidence. Testimony of officer. Official acts. Code* 1892, § 3813.

Under Code 1892, § 3813, requiring country lands sold for taxes to be offered in forty acre tracts:—

(*a*) A sale of an undivided one-half interest in an eighty acre tract is illegal, and

(*b*) It is competent to prove how the sale was conducted by the tax collector who made it. *Stevenson* v. *Reed*, 341.

EXCESSIVE BID AT TAX SALE.

See TAXATION, TAX SALES AND TAX TITLES, 11.

Bank v. *Dodds*, 767.

EXCESSIVE VERDICTS.

See CONSTITUTIONAL LAW, 3.

Yazoo, etc., R. R. Co. v. *Wallace*, 609.

EXHIBITS.

See CRIMINAL LAW AND PROCEDURE, 51.

Self v. *State*, 58.

See CHANCERY PLEADING AND PRACTICE, 16.

Burroughs v. *Gilliland*, 127.

EXPERTS.

See CRIMINAL LAW AND PROCEDURE, 51.

Self v. *State*, 58.

FELONIES.

See MUNICIPALITIES, 2.

Oakland v. *Miller*, 275.

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FIRE INSURANCE.

1. FIREPROOF SAFE CLAUSE. *Evidence.*

A merchant, having a policy of fire insurance on his merchandise conditioned on his keeping books showing the status of his business and requiring him to deposit them in a fireproof safe when the store was not open for business, failed to comply with the policy when he changed his system of bookkeeping, used new books, which brought forward only the footings of the old ones, and did not keep the old books in a fireproof safe, whereby they were destroyed in the fire which burned up the merchandise. *Ætna Insurance Co.* v. *Mount*, 642.

2. SAME. *Waiver. Failure to return unearned premium.*

An insurer, in a policy containing the usual iron safe clause and stipulating that if the policy should become void the unearned portion of the premium should be returned, does not waive a breach of the iron safe clause by failing, after knowledge of the loss, to return or offer to return the unearned portion of the premium; no demand having been made, nor any offer to surrender the policy. *Ib.*

3. SAME. *Pleading. Tender.*

Where in a suit on a fire insurance policy a breach of the fireproof safe clause is a defense, the defendant may, the policy providing for return of the unearned part of the premium when it becomes void, plead the breach and tender the unearned portion of the premium with the plea. *Ib.*

4. SAME. *Several policies. Tender good to some.*

Where an insurer denied liability on several fire policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was good as to that policy on which it was not liable. *Ib.*

5. RIGHT TO DO BUSINESS IN STATE. *Statutory provisions. Code* 1906, *ch.* 24. *Code* 1906, § 2564.

A mutual fire insurance company, having no capital stock, incorporated under ch. 24, Code 1906, and empowered to insure the property of its members only, cannot compel the issuance to it of a certificate of authority to carry on the insurance business generally, under Code 1906, § 2564, providing for the grant of such a certificate to qualified companies desiring to do a general insurance business in the state. *Farmers', etc., Co.* v. *Cole*, 508.

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Fire insurance—Fraud.

FIRE INSURANCE—*Continued.*

6. RIGHT TO DO BUSINESS IN STATE. *Statutory right.*

The statutory right to transact business as an insurance company is the right to do a general business and not the restricted right of a mutual insurance company to insure its own members. *Farmers, etc., Co.* v. *Cole*, 508.

FIRE-PROOF CLAUSE.

See FIRE INSURANCE, 1.

Ætna, etc., Co. v. *Mount*, 642.

FORECLOSURE OF MORTGAGES.

See MORTGAGES, 2, 3.

McClusky v. *Trussel*, 544.

Fullerton v. *McBride*, 420.

FOREIGN TELEPHONE COMPANY.

See EMINENT DOMAIN, 1.

Cumberland, etc., Co. v. *Railroads*, 686.

FORFEITURES.

See BY-LAWS.

See BENEFIT SOCIETIES, 4.

Morgan v. *Independent Order*, 864.

FORGERY.

See CRIMINAL LAW AND PROCEDURE, 53, 54, 55, 56, 57.

State v. *Starling*, 252.

Sherrod v. *State*, 856.

FRANCHISE.

See CONSTITUTIONAL LAW, 8 (*d*).

Gulf, etc., R. R. Co. v. *Adams*, 559.

FRAUD.

1. CONTRACTS. *Performance. Acceptance by architect. Pleading. Evidence.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising archi-

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FRAUD—*Continued.*

tect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and

(*b*) Evidence that the architect acted fraudulently, or made such mistake, is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful. *Standard, etc., Co.* v. *Brantley, etc., Co.*, 16.

2. JUDICIAL SALE. *Setting aside. Fraud. Evidence.*

A judicial sale will not be vacated on the charge that the purchaser fraudulently induced prospective purchasers not to bid against him for the property in the absence of clear, convincing and satisfactory evidence of the fraud. *Locke* v. *Keiler*, 3.

FRAUDULENT CONVEYANCES.

1. STATUTE OF LIMITATIONS. *Code* 1906, §§ 3090, 3091, 3094.

The actual, adverse and continuous possession of land for ten years, claiming it as owner, will defeat a suit to set aside the occupant's deed, duly recorded for that length of time, as having been executed to defeat the creditors of his grantor. *Gordon* v. *Anderson*, 677.

2. SAME. *Concealed fraud. Code* 1906, § 3109. *Burden of proof.*

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim. *Ib.*

3. SAME. *Case.*

Where a grantee filed his deed to land for record promptly after its execution, took actual adverse possession of the land and occupied it continuously for ten years, claiming it as his own adversely to all the world, a suit by the creditors of his grantor, or those claiming under them, based on the charge that the deed to him was fraudulent as to such creditors cannot be maintained, certainly not in the absence of exceptional circumstances. *Ib.*

FRAUDS, STATUTE OF.

1. CODE 1906, § 4775 (*a*). *Promise to answer for debt of another.*

A term in a contract of employment whereby a traveling sales-

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FRAUDS, STATUTE OF—*Continued.*

man agreed to bear a percentage of the losses arising from the insolvency of persons to whom he might sell his employer's goods is not a collateral agreement and does not violate the statute of frauds, Code 1906, § 4775 (a), providing that an action shall not be brought whereby to charge a defendant or other party upon any special promise to answer for the debt or default or miscarriage of another person. *Meyer-Bridges Co.* v. *Badeau*, 27.

2. CODE 1892, § 4229. *Sales of goods. Delivery.*

A verbal sale, involving no cash payment or understanding as to terms of payment, of a flock of sheep ranging in the woods, for four hundred dollars, is not saved from the statute of frauds, Code 1892, § 4229, by the delivery of three pet lambs not of the flock. *Ladnier* v. *Ladnier*, 475.

FRUIT-STAND.

See SUNDAY, 1, 2.

Gulfport v. *Stratakos*, 489.

FUTURES.

GAMBLING. *Recovery of money lost. Right of action. Code* 1906, § 2303. *Judgment of sister state.*

Prior to the enactment of Code 1906, § 2303, authorizing the wife or children of one paying money on a "future" transaction to recover it, a widow who recovered a judgment under a similar law in Tennessee could not maintain an action on the judgment in Mississippi. *Minkus* v. *Armstrong*, 751.

GAMBLING.

See FUTURES.

Minkus v. *Armstrong*, 751.

GRADE, CHANGE OF.

See RAILROADS, 5.

Yazoo, etc., R. R. Co. v. *Smith*, 44.

GUARANTY.

See CONTRACTS, 4.

Staple v. *Vicksburg, etc., Co.*, 848.

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HOMESTEAD.

INHERITANCE. *Right of widow. Equitable title. Code* 1871, § 1956.

Under Code 1871, § 1956, providing that property exempted by law from sale under execution shall on the death of the owner descend to his widow and children as tenants in common, the widow and children of the equitable owner of lands constituting his homestead at his death jointly and equally inherited the same in fee simple. *Warren* v. *Davis*, 336.

HOMICIDE.

See CRIMINAL LAW AND PROCEDURE, 4, 46, 49, 50, 51, 52, 58, 59, 62.

Haywood v. *State*, 461; *Self* v. *State*, 58; *Bell* v. *State*, 104; *Gray* v. *State*, 235; *Woods* v. *State*, 245; *Williams* v. *State*, 319; *Cook* v. *State*, 137; *Johnson* v. *State*, 317.

HOTEL KEEPER AND GUEST.

DAMAGES. *Measure. Loss of property. No market value.*

Where a guest's personal property, having no market value, was lost by the negligence of a hotel keeper, in whose custody it had been placed, his liability is more than nominal; a recovery may be had for the monetary value of the property to the guest. *Austin* v. *Millspaugh*, 354.

HUSBAND AND WIFE.

TENANCY IN COMMON. *Rights of Cotenants. Purchase of outstanding title. Wife of cotenant. Lands.*

Where the land of cotenants is subject to a superior lien granted by a former owner and is sold thereunder:—

(*a*) A purchase by one cotenant will inure to the benefit of all the tenants; and

(*b*) A purchase by the wife of one of the cotenants will likewise inure to the benefit of all of them, although married women have been wholly emancipated from common law disability on account of coverture. *Beaman* v. *Beaman*, 762.

INADEQUACY OF PRICE.

See TRUSTEE'S SALE, 1.

Weyburn v. *Watkins*, 728.

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Indictment.

INDICTMENT.

1. CRIMINAL LAW AND PROCEDURE. *Amendment. Code* 1906, § 1509.

Where the prosecuting attorney, without leave of court and in disregard of Code 1906, § 1509, providing how indictments may be amended, changed the name of the party alleged to have been assaulted, in an indictment for an assault with intent to kill and murder, defendant's motion to quash the amended indictment, the facts being shown, should have been sustained and its denial by the trial court constitutes reversible error. *Shurley* v. *State*, 415.

2. SAME. *How amendments made.*

An indictment can only be amended as provided by Code 1906, § 1509, regulating the subject and requiring an order on the minutes of the court specifying the amendment. *Ib.*

See 15 below; *Richburger* v. *State*, 806.

3. SAME. *Arson. Two offenses in same count.*

An indictment which charges two distinct offenses, punishable by different terms of imprisonment, in the same count is demurrable. *State* v. *Freeman*, 315.

4. SAME. *Burning of house. Personalty therein.*

A count of an indictment averring that defendant burned a house and designated personalty therein charges two offenses. *Ib.*

5. SAME. *Assault with intent to murder. Deadly weapon.*

An indictment for an assault and battery with intent to kill and murder, charging that the offense was committed with a deadly weapon, is not defective for failure to specify the particular weapon used. *Canterbury* v. *State*, 279.

6. SAME. *Conclusion. Constitutional law. Constitution* 1890, *sec.* 169.

An indictment concluding, as required by Constitution 1890, sec. 169, "against the peace and dignity of the state," is properly concluded, although it contains two or more counts and the quoted words do not follow each count. *Starling* v. *State*, 255.

7. SAME. *Last count bad.*

In such case if the last count of the indictment be held bad on demurrer the conclusion remains and is applicable to each preceding count. *Ib.*

8. SAME. *Embezzlement. Code* 1906, § 1136. *Language of statute.*

An indictment of a bank officer for embezzling money belonging to the bank, predicated of Code 1906, § 1136, defining the crime,

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INDICTMENT—*Continued.*

is sufficient if it charge the offense in the language of the statute. *Richburger* v. *State*, 806.

9. CRIMINAL LAW AND PROCEDURE. *Synonymous words.*

In such case, the offense being a statutory one, the indictment need not be drawn in the exact words of the statute, if words synonymous with those employed in the statute to define the crime be used. *Ib.*

10. SAME. *Care or possession.*

Under Code 1906, § 1136, making it a crime for any agent, clerk, officer, etc., to embezzle money which shall have come to his "care or possession," an indictment charging that the defendant had the money under his care is sufficient, as would be one charging that he had the same in his "possession." *Ib.*

11. SAME. *Of money. Amount. Value.*

An indictment for embezzling an amount of money need not charge the value of the money; the words "amount" and "value," when applied to money, are synonymous. *Ib.*

12. SAME. *Under defendant's care. From whom received.*

An indictment for the embezzlement of money, charged to have been under defendant's case, is not objectionable for failing to charge from whom he received it. *Ib.*

13. SAME. *Appeal. Supreme court practice. Code* 1906, § 4936. *Questions not raised at trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, if not made a ground of special exception in the trial court, a conviction of a cashier of a bank for embezzlement from the bank will not be reversed because the indictment charged him as cashier, and not as a director, agent, clerk, servant, or officer of a corporation, where the objection is presented for the first time on appeal. *Ib.*

14. SAME. *Case. Indictment.*

The indictment, alleging that defendant on a specified day, being the cashier of a certain bank, a corporation chartered under the laws of Mississippi, did by virtue of his employment as such cashier have under his care of the property of the bank a large sum of money, which had come into his possession and had been intrusted to his care and keeping by virtue of his employment as such cashier, and did afterwards, without the consent of the bank, wilfully, unlawfully, fraudulently, and feloniously em-

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Indictment.

INDICTMENT—*Continued.*

bezzle the same, and fraudulently and feloniously convert it to his own use, in the absence of an objection in the trial court that he was charged as a cashier and not as a director, agent, clerk, servant or officer of the bank, sufficiently charged the crime of embezzlement as defined by Code 1906, § 1136. *Richburger* v. *State*, 806.

15. CRIMINAL LAW AND PROCEDURE. *Amendment. Code* 1906, § 1509. *Order on minutes. Entry nunc pro tunc.*

An order of court actually made, under Code 1906, § 1509, regulating the subject, authorizing the amendment of an indictment, may be entered on the minutes of the court, from which inadvertently omitted, after the conviction of defendant and upon the hearing of a motion for a new trial or other motion predicated of the omission. *Ib.*

16. SAME. *Code* 1906, § 4936. *Objections not made on trial.*

Under Code 1906, § 4936, providing that a conviction shall not be reversed for error not jurisdictional, unless made a ground of special exception at the trial, an objection that an indictment was amended without entry on the minutes of the order allowing it, as required by Code 1906, § 1509, cannot be heard the first time on appeal. *Ib.*

17. SAME. *Variance. Name.*

Where a bank from which money was alleged to have been embezzled by defendant was chartered as the "Jonestown Bank of Jonestown," and the indictment designated it as the "Jonestown Bank," the variance was immaterial. *Ib.*

18. FORGERY. *Code* 1892, § 1108. *Indictment.*

An indictment, under Code 1892, § 1108, providing that the making with intent to defraud, of a false entry in any book of accounts kept by a moneyed corporation to be, or intended to be, delivered to a person dealing with the corporation, by which any pecuniary obligation is affected, shall be guilty of forgery, is insufficient if it fail to show how a pecuniary obligation was to be affected. *State* v. *Starling*, 252.

19. SAME. *Receiving stolen property. Indictment. Description of goods.*

It is essential in an indictment for receiving stolen property to describe the property with the same particularity as is required in an indictment for larceny. *Wells* v. *State*, 516.

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INDICTMENT—*Continued.*

20. FORGERY. *Waiver. Demurrer. Supreme court practice.*

On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the court below. *Sherrod* v. *State*, 856.

INHERITANCE.

1. HOMESTEAD. *Right of widow. Equitable title. Code* 1871, § 1956.

Under Code 1871, § 1956, providing that property exempted by law from sale under execution shall on the death of the owner descend to his widow and children as tenants in common, the widow and children of the equitable owner of lands constituting his homestead at his death jointly and equally inherited the same in fee simple. *Warren* v. *Davis*, 336.

2. MARRIAGE. *Slaves. Laws* 1865, *p.* 82, *ch.* 4; *Constitution* 1869, *art.* 12, *sec.* 22.

Where a negro man and woman, who had lived together in pursuance of a slave marriage until their emancipation, continued to cohabit and hold themselves out to the world as husband and wife after the adoption of Laws 1865, p. 82, ch. 4, and Constitution 1869, art. 12, sec. 22, providing that all persons who had not been married but were then living together as husband and wife should be held to be lawfully married, the husband could not "off with the old love and on with the new" at pleasure, and his children by the wife inherited his property to the exclusion of the descendants of the mistress. *Haines* v. *Haines*, 100.

INJUNCTION.

1. ACTION AT LAW. *Unconscionable advantage. Deed of trust. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred by the statute of limitations. *Wall* v. *Harris*, 671.

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Injunction.

INJUNCTION—*Continued.*

2. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 109. *Equity. Persons in pari delicto. Municipalities. Contracts. Officers. Purchase of supplies.*

Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply. *Noxubee, etc., Co.* v. *Macon*, 636.

3. CRIMINAL PROSECUTIONS. *Disturbing peace. Megaphone.*

Equity will not enjoin the making of affidavits against a merchant and the arresting and fining him for alleged disturbances of the peace in using a megaphone to call attention to a clearance sale; there being in a just sense no property right involved and his rights, whatever they be, are determinable in the law courts. *Pleasants* v. *Smith*, 440.

4. JUDGMENTS. *Default. Case.*

An equity suit to enjoin a judgment, rendered by default against complainant as a nonresident defendant in an attachment at law, is maintainable where (*a*) defendant was without notice of the suit until after the judgment became final, (*b*) his post-office address was well known to the plaintiff in attachment, (*c*) and he would have received the notice had it been mailed him; and where (*d*) proof of publication was not on file when the judgment was rendered, (*e*) no entry in the records showed that a notice had been mailed to defendant and (*f*) the clerk was unable to testify that it was mailed. *Oliver* v. *Baird*, 718.

5. SAME. *Negligence.*

Equity will not aid the negligent by enjoining the collection of an erroneous judgment at the instance of a defendant therein who failed to avail of a full, adequate, and complete legal remedy for its correction. *Gum Carbo Co.* v. *New Orleans, etc., Gazette*, 177.

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INSOLVENCY.

See CORPORATIONS, 1.

Kretschmar v. *Stone*, 375.

INSTRUCTIONS.

1. ASSAULT AND BATTERY. *Civil action. Challenge.*

In a civil action for assault and battery, it appearing that defendant did not commit the act complained of at the time he was challenged to fight, but went one hundred and twenty-five feet, procured weapons from his desk and returned before striking plaintiff, it was error to give defendant's instruction to the effect that if plaintiff voluntarily entered into and provoked a quarrel with defendant, and used language inviting a fight, for the purpose of, and calculated to bring on a fight, he was not entitled to recover. *Lizana* v. *Lang*, 469.

2. CRIMINAL LAW AND PROCEDURE. *Homicide. Assault with intent to murder. Deliberation. Use of weapon.*

In a prosecution for an assault with intent to murder, instructions authorizing a conviction as charged "even if the blow was struck with a single-barreled shotgun without malice" and announcing that "the law presumes malice from the unlawful and deliberate use of a deadly weapon," are erroneous as justifying an inference that the judge thought there was unlawful and deliberate use of the loaded gun as a deadly weapon, although it was not fired. *Woods* v. *State*, 245.

3. SAME. *Circumstantial evidence.*

Circumstantial evidence is inferior to the testimony of eyewitnesses, and it is error to instruct in a murder trial, where the evidence for the defense would prove an alibi, if credited, that it is as good as any other kind of evidence and that whenever it generates full conviction of guilt beyond a reasonable doubt, the jury should act on such evidence as readily as on any other. *Haywood* v. *State*, 461.

4. SAME. *Homicide. Assault with intent to kill. Instructions.*

Where, on a trial for assault with intent to kill, the defense was that the shooting was accidental, and the facts were shown by eyewitnesses, an instruction that if accused deliberately raised a loaded gun and fired it at the prosecutor only a few feet away, and shot him, inflicting a wound, the law presumed that accused intended to kill the prosecutor unless the contrary ap-

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Instructions.

INSTRUCTIONS—*Continued.*

peared, was erroneous for failing to include the idea that the shooting must be believed to have been by design, and not accidental. *Bell* v. *State*, 104.

5. CRIMINAL LAW AND PROCEDURE. *Evidence, want of.*

An instruction is erroneous and should be refused if there be no evidence of which to predicate it. *Canterbury* v. *State*, 279.

6. SAME. *Request. Court not to give without. Code* 1906, § 793.

In a prosecution for an assault and battery with intent to kill and murder the court is without authority under Code 1906, § 793, so providing, to give an instruction to the effect that the jury might find defendants guilty of a lesser constituent offense, in the absence of a request in writing to do so. *Ib.*

7. SAME. *Harmless error.*

It was not prejudicial error, where the evidence overwhelmingly showed a battery as well as an assault with intent to kill and murder, to instruct that the jury might convict of an assault and battery with intent to kill and murder, upon belief from the evidence that defendants were guilty of an assault with such intent. *Ib.*

8. SAME. *Manslaughter.*

An instruction predicated of an assumption that defendant was excusable for firing two fatal shots into the body of the deceased, but seeking a conviction of manslaughter because of the firing of subsequent shots, should not be given in the absence of all evidence that the subsequent shots shortened the life of the deceased. *Williams* v. *State*, 319.

9. SAME.

In cases of homicide the right of self-defense should not be narrowed by instructions for the state for which there is no predicate in the evidence. *Ib.*

10. SAME. *Modification.*

If the trial court modify an instruction which was correct as asked, the party asking it may complain of its erroneous modification on appeal. *Coleman* v. *Yazoo, etc., R. R. Co.*, 629.

See WITNESSES.

Smith v. *State*, 111.

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INSURANCE.

1. BENEFIT SOCIETIES. *Membership. Recourse to courts. Remedies within order.*

Where the laws of a benefit society provide appeals for the correction of erroneous decisions touching the rights of its members, an application by a member to the courts for relief will not be entertained until he has exhausted his remedies within the society. *Ward* v. *Odd Fellows*, 116.

2. SAME. *New laws. Validity.*

A duly enacted law of a benefit society creating a compulsory insurance department, requiring the payment of a dollar per month by its members, except the aged and disabled, and barring those who fail to pay from meeting with a lodge is reasonable and valid, and, the by-laws authorizing it, may be applied as well to existing as to new members. *Ib.*

3. SAME. *By-laws. Construction. Forfeitures.*

The by-laws of a mutual benefit society are to be liberally construed in favor of the insured, so as to prevent a forfeiture. *Morgan* v. *Jacobs*, 864.

4. SAME. *Rules.*

Mutual benefit societies are subject to the same rules of law as other life insurance companies, save in so far as such rules may be lawfully modified by the objects and purposes of the society's organization. *Ib.*

5. SAME. *Waiver. Estoppel.*

An insurance company or benefit society can not exempt itself in advance, either by contract or by-laws, from an estoppel to assert a forfeiture of a policy where there has been a breach of conditions on the part of the insured and the society's conduct has been such as to affirmatively induce the belief that the forfeiture was waived. *Ib.*

6. SAME. *Case.*

Under the by-laws of a benefit society, requiring payment of one dollar in advance on the first day of each month and declaring that a member who failed to pay an assessment, on or by the day it becomes due, was thereby suspended, and providing that a suspended member could be reinstated only in a designated way; a member was not suspended who fully paid all demands for eleven years, because he was then delinquent one day in the payment of one dollar, received from him the next day, as were all subsequent assessments when due, without question. *Ib.*

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Insurance.

INSURANCE—*Continued.*

7. BENEFIT SOCIETIES. *Equitable estoppel. Forfeitures. Mala fides.*

A mutual benefit society may be estopped by conduct to the same extent as a natural person, and a forfeiture of an insurance policy will not be adjudged in its favor where the insured acted in good faith and paid all the dues required and the society was not injured by any act of his. *Morgan* v. *Jacobs*, 864.

8. SAME. *Contracts. Benefit association. Application rejected.*

A contract cannot be predicated of an application to a benefit association for life insurance by one who failed to comply with the regulations of the order and whose application was not passed upon by the medical examiner of the association until after the applicant's death, and then rejected. *Brotherhood* v. *Hand*, 893.

9. FIRE INSURANCE. *Corporations. Right to do business in state. Statutory provisions. Code* 1906, *ch.* 24. *Code* 1906, § 2564.

A mutual fire insurance company, having no capital stock, incorporated under ch. 24, Code 1906, and empowered to insure the property of its members only, cannot compel the issuance to it of a certificate of authority to carry on the insurance business generally, under Code 1906, § 2564, providing for the grant of such a certificate to qualified companies desiring to do a general insurance business in the state. *Farmers, etc., Co.* v. *Cole*, 508.

10. SAME. *Statutory right.*

The statutory right to transact business as an insurance company is the right to do a general business and not the restricted right of a mutual insurance company to insure its own members. *Ib.*

11. SURETY COMPANY. *Regulation of agents. License fees. Agents. Code* 1906, § 3828.

Under Code 1906, § 3828, imposing a privilege tax of five dollars on an agent representing a surety company exclusively, such agent is not liable to any greater tax, although he do business in a city of more than two thousand inhabitants and other provisions of the Code impose a larger tax upon insurance agents in such cities and provide that surety companies shall be subject to the insurance laws of the state and the control of the insurance commissioner. *Cole* v. *American, etc., Co.*, 782.

12. TRUSTS AND COMBINES. *Subrogation. Laws* 1900, *p.* 125.

The subrogation of an insurance company to the right of action of the insured against a wrongdoer through whose tort the property was destroyed by fire has no relation to the business of an

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INSURANCE—*Continued.*

unlawful combination of which the company is a member, and is unaffected by Laws 1900, p. 125, avoiding all contracts made by members of such a combination for any purpose relative to the business thereof. *Freed* v. *American, etc., Co.*, 72.

See FIRE INSURANCE, 1, 2.

Ætna, etc., Co. v. *Mount*, 642.

INTERLOCUTORY JUDGMENT.

APPEALS. *Circuit court judgments. Code* 1906, § 4910; *Code* 1906, § 4911.

Code 1906, § 4910, purporting to provide that a circuit court should not grant a new trial because of an excessive verdict but that the supreme court might in such case require a remittitur, and Code 1906, § 4911, purporting to authorize appeals from certain interlocutory judgments of the circuit court, being parts each of the other, and one of them being unconstitutional (see *Yazoo, etc., Co.* v. *Wallace*, the last preceding case in this volume), the other falls with it. *Yazoo, etc., R. R. Co.* v. *Reid*, 616.

INTERVENTION.

See CHANCERY PLEADING AND PRACTICE, 2.

Bush v. *Quick*, 32.

JUDGMENTS.

1. DEFAULT. *Injunction. Case.*

An equity suit to enjoin a judgment, rendered by default against complainant as a nonresident defendant in an attachment at law, is maintainable where (*a*) defendant was without notice of the suit until after the judgment became final, (*b*) his post-office address was well known to the plaintiff in attachment, (*c*) and he would have received the notice had it been mailed him; and where (*d*) proof of publication was not on file when the judgment was rendered, (*e*) no entry in the records showed that a notice had been mailed to defendant and (*f*) the clerk was unable to testify that it was mailed. *Oliver* v. *Baird*, 718.

2. NEGLIGENCE. *Injunction. Equity practice.*

Equity will not aid the negligent by enjoining the collection of an erroneous judgment at the instance of a defendant therein who

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JUDGMENTS—*Continued.*

failed to avail of a full, adequate and complete legal remedy for its correction. *Gum Carbo Co.* v. *New Orleans, etc., Gazette*, 177.

JUDGMENTS OF SISTER STATE.

See FUTURES.

Minkus v. *Armstrong*, 751.

JUDICIAL SALES.

SETTING ASIDE. *Fraud. Evidence.*

A judicial sale will not be vacated on the charge that the purchaser fraudulently induced prospective purchasers not to bid against him for the property in the absence of clear, convincing and satisfactory evidence of the fraud. *Locke* v. *Keiler*, 3.

JURISDICTION.

1. ATTACHMENTS IN CHANCERY. *Code* 1906, § 536. *Proceedings. Personal decree.*

Under Code 1906, § 536, providing for attachments in chancery against nonresident debtors, a court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of complainant's debt not realized by sale of the attached property. *Hall, etc., Co.* v. *Foote*, 422.

2. REMEDIAL STATUTES. *Vested right.*

A litigant has no vested right in a rule of procedure or a remedial statute. *Ib.*

3. CONSTITUTIONAL LAW. *Courts. Supreme court. Original and appellate. New trials. Excessive verdicts. Remittiturs. Code* 1906, § 4910.

Code 1906, § 4910, purporting to deprive the circuit courts of power to grant defendants new trials for excessive verdicts and to authorize the supreme court alone to require remittiturs, is unconstitutional:—

(*a*) It denies a defendant the right to have a complete disposition of his case in a forum provided by the organic law for the administration of justice to all; and

(*b*) It undertakes to confer original jurisdiction on the supreme court to which under the constitution appellate jurisdiction alone belongs. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.

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JURISDICTION—*Continued.*

4. PRIMARY ELECTIONS. *Contests. Courts.*

In the absence of a statutory grant of jurisdiction in such cases the courts will not hear and determine contested political party primary election cases, although such elections are provided for and sought to be regulated by law. *Ramey* v. *Woodward.*

5. SAME. *Judicial review. Mandamus. Recounts.*

The circuit court has no jurisdiction of a suit:—

(*a*) To contest the result of a political party primary election; nor by mandamus.

(*b*) To compel the executive committee of a political party to recanvass the votes cast at such an election. *State ex rel.* v. *Brown*, 876.

6. SPECIAL TERM. *Circuit Court. Order. Entry on minutes. Code* 1906, § 988.

The failure of the clerk to enter on the minutes of a circuit court an order for a special term thereof, which was duly made and published, does not affect the validity of proceedings had at such term, though Code 1906, § 988, provides that such order shall be entered on the minutes as well as be made and published. *Ex parte Neil*, 518.

JURY.

SEE CRIMINAL LAW AND PROCEDURE, 61, 62, 63 ,64, 65, 66, 67.
Cook v. *State*, 137.

JUSTICE OF THE PEACE.

PLEADINGS. *Statement of cause of action. Code* 1892, § 2401.

The filing of an affidavit simply charging that defendant is justly indebted to plaintiff in a designated sum does not comply with Code 1892, § 2401, requiring any one desiring to sue before a justice of the peace to lodge with him "the evidence of debt, statement of account or other written statement of the cause of action" of which the suit is predicated. *Greenburg* v. *Massey*, 121.

LAND AND CONVEYANCES.

SUCCESSION OF DONEES. *Code* 1892, § 2436.

Under Code 1892, § 2436, so providing it is competent by deed to convey lands to a succession of living donees, not exceeding two,

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LAND AND CONVEYANCES—*Continued.*

and to the heirs of the body of the remainderman, and in default thereof to the right heirs of the donor in fee simple. *Brinson* v. *Sandifer*, 41.

LARCENY.

CRIMINAL LAW AND PROCEDURE. *Affidavit. Separate articles. Different owners.*

An affidavit charging petit larceny is not vitiated by averring the articles of property stolen to belong to different owners; but on the trial in such case the state would be compelled to show a single asportation. *Ward* v. *State*, 249.

LAWS (OTHER THAN CODE SECTIONS) CONSTRUED.

1. Laws 1865, ch. 4, p. 82. *Haines* v. *Haines*, 100.
2. Laws 1875, ch. 24, p. 49. *Kennedy* v. *Sanders*, 524.
3. Laws 1896, ch. 84, p. 93. *Cook* v. *State*, 137.
4. Laws 1897, ch. 16, p. 17. *Lincoln County* v. *Brookhaven*, 5.
5. Laws 1898, ch. 5, p. 23, sec. 66. *Gulf, etc., R. R. Co.* v. *Adams*, 559.
6. Laws 1900, ch. 88, p. 125. *Freed* v. *American, etc., Co.*, 72.

LIENS.

See VENDOR AND VENDEE.

Burroughs v. *Gilliland*, 127.

LIMITATION OF ACTIONS.

1. ACKNOWLEDGMENT OF DEBT. *Code* 1892, § 2757. *Code* 1906, § 3118.

A deed of conveyance which provides that in consideration thereof the grantee is to credit the grantor's indebtedness to him with a certain sum and that such conveyance shall not impair the lien of a fully identified trust deed as a security for whatsoever balance the grantor owed is, under Code 1892, § 2757, a sufficient acknowledgment, in writing, signed by the party chargeable thereby, to save the bar of the statute of limitations, in a proceeding to foreclose the trust deed,—the amount acknowledged to be due being readily ascertainable by applying the credit on the indebtedness. *Stewart* v. *Foreman*, 85.

2. FRAUDULENT CONVEYANCES. *Code* 1906, §§ 3090, 3091, 3094.

The actual, adverse and continuous possession of land for ten

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Limitation of actions.

LIMITATION OF ACTIONS—*Continued.*

years, claiming it as owner, will defeat a suit to set aside the occupant's deed, duly recorded for that length of time, as having been executed to defeat the creditors of his grantor. *Gordon* v. *Anderson*, 677.

3. FRAUDULENT CONVEYANCES. *Concealed fraud. Code* 1906, § 3109. *Burden of proof.*

To bring a case within the exception to the statute of limitations touching concealed frauds, the party claiming the benefit of the exception must aver and prove the facts which justify his claim. *Ib.*

4. SAME. *Case.*

Where a grantee filed his deed to land for record promptly after its execution, took actual adverse possession of the land and occupied it continuously for ten years, claiming it as his own adversely to all the world, a suit by the creditors of his grantor, or those claiming under them, based on the charge that the deed to him was fraudulent as to such creditors cannot be maintained, certainly not in the absence of exceptional circumstances. *Ib.*

5. TAXATION. *Tax sale. Unconstitutional law. Code* 1880, § 539. *Code* 1892, § 2735. *Code* 1906, § 3095.

A tax sale based upon a pretended assessment, made under a statute violative of the constitution, is not aided by the three years' statute of limitations, Code 1880, § 539, Code 1892, § 2735, Code 1906, § 3095. *Eastland* v. *Yazoo, etc., Lumber Co.*, 330.

6. SAME. *Chancery clerk. Code* 1880, § 539; *Code* 1892, § 2735.

The three-years' statutes of limitation has no application to an illegal purchase of lands by the chancery clerk at a tax sale. *Barker* v. *Jackson*, 621.

7. SAME. *Inapplicability. Code* 1871, § 1709; *Code* 1880, § 539.

A tax-collector being without power to sell under the Abatement Act land not delinquent for taxes that accrued prior to the year 1874, his sale of such land is void, and none of the statutes of limitations designed specially to protect tax titles are applicable to a claim under such sale. *Kennedy* v. *Sanders*, 524.

8. SAME. *Adverse possession. Evidence. Assessment.*

The assessment of lands to defendants does not prove that they paid the taxes thereon, and is valueless as evidence of adverse possession. *Ib.*

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Limitation of actions—Marriage.

LIMITATION OF ACTIONS—*Continued.*

9. TAXATION. *Title. Removal of clouds. Code* 1892, § 2731.

A proceeding in equity by the holder of a valid paper title to land to remove a cloud thereon asserted by one not in possession is not barred by his failure to sue within the period he might have made an entry or sued at law to recover the land under Code 1892, § 2731, providing that suits in equity to recover land may not be brought but within the period during which by virtue of § 2730 of said code he might have made an entry or brought an action to recover the land, if he had been entitled at law. *Kennedy* v. *Sanders*, 524.

LIQUIDATED DAMAGES.

See BONDS.

Coker v. *Brevard*, 64.

LOANS.

See BUILDING AND LOAN ASSOCIATIONS.

Bank v. *Armor*, 709.

MACHINERY.

See APPLIANCES.

See RAILROADS.

Jones v. *Yazoo, etc., R. R. Co.*, 547.

MANDAMUS.

PRIMARY ELECTION. *Circuit court. Jurisdiction.*

The circuit court has no jurisdiction of a suit to compel, by mandamus, the executive committee of a political party to recanvass the votes cast at a party primary election. *State ex rel.* v. *Brown*, 876.

MARRIAGE.

SLAVES. *Laws* 1865, *p.* 82, *ch.* 4; *Constitution* 1869, *art.* 12, *sec.* 22. *Inheritance.*

Where a negro man and woman, who had lived together in pursuance of a slave marriage until their emancipation, continued to cohabit and hold themselves out to the world as husband and wife after the adoption of Laws 1865, p. 82, ch. 4, and Constitution 1869, art. 12, sec. 22, providing that all persons who had not

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MARRIAGE—*Continued.*

been married but were then living together as husband and wife should be held to be lawfully married, the husband could not "off with the old love and on with the new" at pleasure, and his children by the wife inherited his property to the exclusion of the descendants of the mistress. *Haines* v. *Haines*, 100.

MATERIALMAN.

See MECHANIC'S LIENS.

Lake v. *Brannin*, 737.

MEASURE OF DAMAGES.

See DAMAGES, 4.

Austin v. *Millspaugh*, 354.

MECHANIC'S LIENS.

MATERIALMEN. *Code* 1906, §§ 3058, 3074. *Nothing due mechanic. Accounting.*

An owner who employed a mechanic to furnish materials and improve a house for him is not, nor is the house, liable in a suit by third parties, materialmen, to enforce the lien given by Code 1906, § 3058, unless he be indebted to the mechanic on the contract price when notified, as provided by Code 1906, § 3074, of plaintiff's claim; and he is to be credited with any sum paid or agreed to be paid by him to others, before such notice, for materials used in the building. *Lake* v. *Brannin*, 737.

MEGAPHONE.

See INJUNCTION, 3.

Pleasants v. *Smith*, 440.

MERCHANT.

See SUNDAY, 1, 2.

Gulfport v. *Stratakos*, 489.

MONEY.

See CRIMINAL LAW AND PROCEDURE, 21.

Richburger v. *State*, 806.

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MORTGAGES.

1. EQUITY. *Injunction. Action at law. Unconscionable advantage. Deed of trust. Void sale. Ejectment after debt barred.*

A court of chancery, at the suit of a complainant willing to do equity, will enjoin an ejectment against the beneficiary in a deed of trust on the land, predicated of an invalidity in the appointment of a substituted trustee by whom the land was sold to complainant, instituted after the complainant had been in possession for eight years and the debt secured by the deed had become barred by the statute of limitations. *Wall* v. *Harris*, 671.

2. FORECLOSURE SALE. *Deeds of trust. Constitution* 1890, *sec.* 111; *Code* 1892, § 2443. *Bulk sales.*

The lump sale under a mortgage or deed of trust of a four hundred acre tract of land is void if made in violation of Constitution 1890, sec. 111, providing for the sale of lands, under decrees and executions in subdivisions not exceeding one hundred and sixty acres, as extended to sales under mortgages and deeds of trust by Code 1892, § 2443. *McClusky* v. *Trussel*, 544.

3. PRIORITY. *Foreclosure of second. Rights under partly void first.*

Where the description of a part of the property sought to be conveyed by a first deed of trust was void and a second deed of trust on the same property accurately described the whole of it, but recited that a "part of the above property" was subject to the prior deed; and there was a foreclosure of the second deed and a purchase of all the property by the beneficiary therein, the beneficiary in the first deed, by appropriate proceedings can:—

(*a*) Compel the purchaser to account for the value of the property accurately described in the first deed; and

(*b*) Recover a personal decree against his debtor, the grantor, in the first deed, for the sum due him after giving credit for the value of the property for which he has held the purchaser under the second deed. *Fullerton* v. *McBride*, 420.

4. SALES. *Conditional sale. Reservation of title. Waiver.*

The retention by the seller of title to personal property conditionally sold to secure the purchase money is not waived by his contemporaneously taking a mortgage from the buyer upon the same and other property to secure the debt. *Champenois* v. *Tinsley*, 38.

5. SAME. *Implied waivers.*

The doctrine of implied waiver can be invoked to defeat implied liens, not express ones. *Ib.*

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MORTGAGES—*Continued.*

6. SATISFACTION. *Entry of record. Mortgagor's liability. Code* 1892, § 2451 (*Code* 1906, § 2781).

In an action arising under Code 1892, § 2451 (Code 1906, § 2781) to enforce the liability of a mortgagor who has failed, after request, to enter satisfaction on the record of the mortgage, it is no defense to show that the mortgage describes the property with reference to a survey and omits to mention the block in which the lots described by number are located, though the survey includes more than one block containing lots so numbered. *Peirce* v. *Kingston Lumber Co.*, 216.

7. SAME. *Subrogation.*

A party to a void marriage who, honestly believing that he is the husband of the other party thereto, on her verbal promise to convey him a half interest in the property, satisfies a mortgage on her land, is a mere volunteer and not entitled to be subrogated to the rights of the mortgagee. *Brown* v. *Brown*, 410.

MUNICIPALITIES.

1. CONSTITUTIONAL LAW. *Constitution* 1890, *sec.* 109. *Equity. Injunctions. Persons in pari delicto. Contracts. Officers. Purchase of supplies.*

Under Constitution of 1890, sec. 109, providing, among other things, that no officer shall be interested in a municipal contract authorized by any board of which he is a member:—

(*a*) A contract by a municipality with one of its aldermen, although ratified by the municipal board, is prohibited, and

(*b*) An injunction against purchases by a municipality in violation of the section will not be denied because complainant, or if a corporation one of its officers, while himself an alderman, had made like sales; and

(*c*) The interest of the public, in such case, is to be considered and the principle that the law will leave persons in *pari delicto* where found does not apply. *Noxubee, etc., Co.* v. *Macon*, 636.

2. CRIMES AGAINST. *Ordinances. Felonies. Code* 1906, § 3410.

A municipal ordinance undertaking to make all crimes against the state, including felonies committed within municipal limits, a municipal offense, is void; Code 1906, § 3410, giving all the authority granted in the premises, expressly limits the power to misdemeanors. *Oakland* v. *Miller*, 275.

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MUNICIPALITIES—*Continued.*

3. DRAINAGE. *Defects in sewers. Notice. Adoption.*

Where a municipality assumed and exercised control and dealt with a manhole and a cross-pipe as parts of its drainage system, it is liable to the owner of adjacent premises for damages resulting from their wrongful construction, if, being duly notified of the defects, it fail to make correction, although the cross-pipe was originally placed in position by a previous owner of the premises. *Fewell* v. *Meridian*, 380.

4. SAME. *Insufficient.*

A municipality is liable for damages due to the insufficiency of an artificial drain substituted by it for one originally on plaintiff's premises. *Ib.*

5. SAME. *Sewerage. Nuisances.*

A city is liable for damages if it fail, after notice, to prevent private sewage being emptied into the gutters along the sides of its streets whereby offal is carried to and collected on a vacant lot, creating a nuisance and rendering a near-by dwelling house uninhabitable. *Vicksburg* v. *Richardson*, 1.

6. ROAD TAXES. *Code* 1892, § 2939. *Ib.*, § 3931. *Laws* 1897, *ch.* 16, *p.* 17, *sec.* 16. *Road taxes. County road fund. Rights of city.*

A municipality governed by the Code chapter entitled "Municipalities," being a separate road district, Code 1892, § 2939, is entitled to one-half of a road tax levied, under Code 1892, § 3931, laws 1897, ch. 16, p. 17, sec. 16, by the county and collected on property within its corporate limits. *Lincoln County* v. *Brookhaven*, 5.

7. SIDEWALKS. *Defective. Personal injuries. Knowledge.*

A municipality which allows a dangerous hole to remain in its sidewalk for several months without taking any precautions to give warning of the danger is liable to one who steps into the hole and is injured while going along the walk, which was inadequately lighted, on a dark rainy night, although such person knew that the hole existed and the injury resulted from momentary forgetfulness of its presence. *Natchez* v. *Lewis*, 310.

MUNICIPAL OFFENSES.

See MUNICIPALITIES, 2.

Oakland v. *Miller*, 275.

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NAME.

See CRIMINAL LAW AND PROCEDURE, 29.
Richburger v. *State*, 806.

NAVIGABLE STREAMS.

OBSTRUCTIONS. *Equitable remedies. Pleadings.*

A bill in equity to compel the removal of obstructions to the navigation of a stream created by a railroad company is not demurrable if it show that complainant has a special statutory exclusive right for a term of years to navigate the stream and that the defendant has constructed railroad bridges across it in such a way as to needlessly obstruct navigation and had thereby interfered with complainant's enjoyment of its exclusive right. *Silver Creek, etc., Co.* v. *Yazoo, etc., R. R. Co.*, 345.

NECESSITY.

See SUNDAY, 1, 2.
Gulfport v. *Stratakos*, 489.

NEGLIGENCE.

See INJUNCTIONS, 5.
Gum Carbo Co. v. *New Orleans, etc., Gazette*, 177.

NEW PROMISE.

See LIMITATION OF ACTIONS, 1.
Stewart v. *Foreman*, 85.

NEW TRIALS.

1. REASONS. *Hearing. Code* 1906, § 801.

Under Code 1906, § 801, providing that, when a motion for a new trial shall be granted or refused, either party may reduce to writing the reasons offered for the new trial, etc., and tender same as a bill of exceptions, which shall be signed by the trial judge, on which error may be assigned, the circuit court, on the hearing of a motion by accused for a new trial, is only required to consider the reasons assigned therefor in writing. *Richburger* v. *State*, 806.

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NEW TRIALS—*Continued.*

2. REASONS—*Assignment of grounds.*

A general complaint that the court erred in admitting illegal, incompetent, and irrelevant evidence, or refusing to admit legal, competent and relevant evidence, is insufficient. *Richburger* v. *State*, 806.

3. SAME.

A motion for a new trial for erroneous rulings in the admission or rejection of evidence should designate each of the particular rulings complained of, and make such specific reference to the evidence as will clearly disclose to the trial judge the rulings questioned. *Ib.*

4. SAME. *Reference to bill of exceptions.*

A motion for a new trial, which refers to the evidence as contained in the bill of exceptions, or other writing not filed when the motion was acted on, though filed thereafter, is too indefinite, and presents no question concerning the evidence for review. *Ib.*

5. SAME.

Objections in a motion for a new trial that the court erred in admitting incompetent evidence for the state over objections and exceptions of accused, and in excluding competent evidence offered by accused, are insufficient. *Ib.*

6. SAME. *Construction. Presumption.*

A court is not bound to help out a defective motion for a new trial by construction or supposition. *Ib.*

NOTICE.

See DEEDS OF TRUST, 4.

Weyburn v. *Watkins*, 728.

See MUNICIPALITIES, 3.

Fewell v. *Meridian*, 380.

NUISANCE.

See MUNICIPALITIES, 5.

Vicksburg v. *Richardson*, 1.

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OBSTRUCTION OF NAVIGABLE WATERS.

See NAVIGABLE STREAMS.

Silver Creek, etc., Co. v. *Yazoo, etc., R. R. Co.*, 345.

OFFICERS.

See MUNICIPALITIES, 1.

Noxubee, etc., Co. v. *Macon*, 636.

OFFICIAL ACTS.

WITNESS. *Evidence. Tax sale.*

It is competent to prove how a tax sale was conducted by the tax collector who made it. *Stevenson* v. *Reed*, 341.

OFFICIAL BONDS.

See TAXATION, TAX SALES AND TAX TITLES, 11.

Bank v. *Dodds*, 767.

PARTIES.

1. AMENDMENT. *Substitution. Trustee having legal title. Practice.*

Where the beneficiary in a deed of trust erroneously brought an action of replevin in his own name for the property conveyed, an amendment making the trustee plaintiff in the suit, seasonably asked, should have been allowed in the circuit court, although the case originated in a justice of the peace court. *McCue* v. *Massey*, 124.

2. PARTITION. *Partnership accounting.*

In a suit for partition of lands, formerly belonging to complainant and a third person as partners, and for an accounting of the partnership affairs so that the sum due complainant arising therefrom may be charged upon defendant's interest in the lands, the former partner is a necessary party to the suit, although before suit begun he conveyed his entire interest in the lands to defendants and complainant sold to him all the partnership property except the lands. *Moses* v. *Krauss*, 618.

3. SALES. *Reservation of title.*

One who sells to his partner, with a reservation of title until payment, his undivided interest in partnership property previously sold by the firm with a like reservation of title, may,

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PARTIES—*Continued.*

on default of the firm's vendee, whose purchase money notes are held by him as collateral security, maintain replevin for the property without making his partner a party. *Brumfield* v. *Hoover*, 502.

4. TAX-TITLES. *Bill to confirm. Code* 1892, § 498 (*Code* 1906, § 548).

A bill to confirm a tax-title under Code 1892, § 498, providing that all persons interested be made defendants is demurrable for want of proper parties where one named in the tax-deed exhibited with the bill as the person assessed with the taxes for which the land was sold, is not made a defendant, nor any reason given for such omission, although the bill is verified by oath and alleges "that the defendants named are the only ones, so far as complainant can ascertain after diligent inquiry." *Smith* v. *Denny Co.*, 434.

5. SAME. *Leave to amend. Dismissal.*

When a demurrer to a bill has been sustained for want of proper parties, it is not error to dismiss the bill on complainant's declining to avail of leave to amend by joining as a defendant the party improperly omitted. *Ib.*

PARTITION.

1. CHANCERY PLEADING AND PRACTICE. *Parties. Partnership accounting.*

In a suit for partition of lands, formerly belonging to complainant and a third person as partners, and for an accounting of the partnership affairs so that the sum due complainant arising therefrom may be charged upon defendant's interest in the lands, the former partner is a necessary party to the suit, although before suit begun he conveyed his entire interest in the lands to defendants and complainant sold to him all the partnership property except the lands. *Moses* v. *Krauss*, 618.

2. SAME. *Tender. Partition.*

A defendant in a partition suit, who by his answer claims a greater interest in partnership lands than the complainant, his copartner, concedes to be his, should not be denied his share as claimed because of his failure to pay into the court a balance due on his contribution to the joint purchase when by his answer and testimony he denies knowledge of the amount of such balance and alleges his readiness to pay the same when ascer-

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PARTITION—*Continued.*

tained and previous offers by him so to do. *Peirce* v. *Halsell*, 171.

3. SOLICITOR'S FEES. *Code* 1906, § 3542; *Code* 1892, § 3119.

In an action for partition, where defendant's employment of a separate solicitor was essential to the protection of his rights, the court should not, under Code 1892, § 3119; Code 1906, § 3542, regulating the subject, charge defendant's interest in the land with any part of complainant's solicitor's fees. *Bowles* v. *Wood*, 742.

PARTNERSHIP.

See PARTIES, 2; PARTITION, 1.

Moses v. *Krauss*, 618.

PASSENGERS.

1. CARRIERS. *Railroads. Liability for act of employes. Conductor's right. Self-defense.*

A conductor of a passenger train has a right to defend himself from an attack by a passenger, but he has no right to strike a passenger with a pistol for the use of abusive language to him. *Coleman* v. *Yazoo, etc., R. R. Co.*, 629.

2. SAME. *Bystanders. Injuries.*

If a railroad conductor strike a passenger with a loaded pistol, not in self-defense, but because of the passenger's abusive language, and the weapon be discharged by the blow, the company will be liable for damages resulting from the shot to an innocent bystander, although the shooting be at a station and the bystander not a passenger. *Ib.*

3. RAILROADS. *Tickets. Ejection. Description of purchaser. Punch marks.*

A railroad passenger is not required to verify the punch marks placed on his ticket by the selling agent, and where the ticket described the passenger otherwise accurately, even noting the fact of his having a mustache, a conductor is not authorized to eject him because the selling agent by mistake punched the ticket for a female instead of a male. *Illinois, etc., R. R. Co.* v. *Gortikov*, 787.

4. SAME. *Return limit.*

Where by its terms a railroad ticket is good for a return trip

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PASSENGERS—*Continued.*

until a given date, its limit is not shortened by punch marks in its margin, placed there mistakenly by the selling agent. *Illinois, etc., R. R. Co.* v. *Gortikov*, 787.

5. RAILROADS. *Ejection. Punitive damages.*

The original purchaser of a return railroad ticket, if ejected by the conductor because the selling agent had erroneously punched his ticket for a female instead of a male, can recover both actual and punitive damages where the conductor, saying "this is a bogus ticket," ejected him without giving him an opportunity to explain. *Ib.*

6. SAME. *Contracts. Cautionary provisions. Unreasonable contracts void.*

A provision on a railroad ticket, printed under the head "Caution," to the effect that in cases of doubt between the passenger and conductor the passenger should pay the sum demanded by the conductor, take his receipt and report the same to the general office of the company, where the same would "receive prompt attention," is mere advice and not a contractual part of the ticket; but, if regarded as a part of the contract, it is unreasonable and void. *Ib.*

PENALTY.

See BONDS.

Coker v. *Brevard*, 64.

PLEADING AND PRACTICE.

1. CONTRACTS. *Performance. Acceptance by architect. Fraud. Evidence.*

Where a contract for building material stipulated that the granite to be furnished should be satisfactory to the supervising architect and that all not so satisfactory should be removed from the building and premises:—

(*a*) An approval of the granite by the architect is a condition precedent to a recovery for its price, unless it were refused through fraud, such gross mistake as would imply bad faith or failure to exercise an honest judgment; and

(*b*) Evidence that the architect acted fraudulently, or made such mistake, is not admissible where not pleaded, although it be pleaded that the judgment of the architect was wrongful. *Standard, etc., Co.* v. *Brantley, etc., Co.*, 16.

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Pleading and practice—Premiums.

PLEADING AND PRACTICE—*Continued.*

2. JUSTICE OF THE PEACE. *Statement of cause of action. Code* 1892, § 2401.

The filing of an affidavit simply charging that defendant is justly indebted to plaintiff in a designated sum does not comply with Code 1892, § 2401, requiring any one desiring to sue before a justice of the peace to lodge with him "the evidence of debt, statement of account or other written statement of the cause of action" of which the suit is predicated. *Greenburg* v. *Massey*, 121.

3. PARTIES. *Substitution. Amendment. Trustee having legal title.*

Where the beneficiary in a deed of trust erroneously brought an action of replevin in his own name for the property conveyed, an amendment making the trustee plaintiff in the suit, seasonably asked, should have been allowed in the circuit court, although the case originated in a justice of the peace court. *McCue* v. *Massey*, 124.

4. TENDER. *Insurance premium.*

Where in a suit on a fire insurance policy a breach of the fireproof safe clause is a defense, the defendant may, the policy providing for return of the unearned part of the premium when it becomes void, plead the breach and tender the unearned portion of the premium with the plea. *Ætna, etc., Co.* v. *Mount*, 642.

5. SAME. *Several policies. Tender good to some.*

Where an insurer denied liability on several fire policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was good as to that policy on which it was not liable. *Ib.*

PRECATORY TRUST.

See WILLS, 7.

Courtenay v. *Courtenay*, 181.

PREMIUMS.

See PLEADING AND PRACTICE, 4, 5.

Ætna, etc., Co. v. *Mount*, 642.

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PRIMARY ELECTIONS.

1. CONTESTS. *Courts. Jurisdiction.*

In the absence of a statutory grant of jurisdiction in such cases the courts will not hear and determine contested political party primary election cases, although such elections are provided for and sought to be regulated by law. *Ramey* v. *Woodward*, 777.

2. SAME. *Judicial review. Mandamus. Recounts. Jurisdiction.*

The circuit court has no jurisdiction of a suit:—

(*a*) To contest the result of a political party primary election; nor by mandamus.

(*b*) To compel the executive committee of a political party to recanvass the votes cast at such an election. *State ex rel.* v. *Brown*, 876.

PRINCIPAL AND AGENT.

UNAUTHORIZED ACT. *Scope of agency. Duty to ascertain. Contracts.*

Persons who deal with the agent of another must learn the scope of his authority or act at their own peril. *Busby* v. *Yazoo, etc., R. R. Co.*, 13.

PRINCIPAL AND SURETY.

DEED OF TRUST. *Right to sell.*

The right to sell under a deed of trust existing, a surety cannot complain of a trustee's sale of lands any more than a principal debtor. *Weyburn* v. *Watkins*, 728.

PRIVILEGE TAXES.

1. INSURANCE. *Regulation of agents. License fees. Surety companies. Agents. Code* 1906, § 3828.

Under Code 1906, § 3828, imposing a privilege tax of five dollars on an agent representing a surety company exclusively, such agent is not liable to any greater tax, although he do business in a city of more than two thousand inhabitants and other provisions of the Code impose a larger tax upon insurance agents in such cities and provide that surety companies shall be subject to the insurance laws of the state and the control of the insurance commissioner. *Cole* v. *American, etc., Co.*, 782.

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PRIVILEGE TAXES—*Continued.*

2. RAILROADS. *Laws* 1898, *p.* 66. *United States Constitution, Fourteenth Amendment. Constitution* 1890, *sec.* 112. *Due process of law. Corporate franchises. Taxation. Double taxation.*

Laws 1898, p. 23, sec. 66, purporting to impose on each railroad company claiming an exemption from state supervision, under maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing the obligation of contracts shall not be passed, since it impairs the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(*c*) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

(*d*) Considered as an *ad valorem* tax on the value of the exemption as property the additional privilege tax is violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since the revenue laws provide that there shall be an assessment of railroad property for *ad valorem* taxes by the railroad commission, values to be fixed with reference to the earning capacity of the companies and their franchises, and it must be presumed that the commission has considered the exemption as an element of property value. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

PUNCH MARKS.

See RAILROADS, 10.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

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PURCHASE MONEY.

See VENDOR AND VENDEE.

Burroughs v. *Gilliland*, 127.

PUNITIVE DAMAGES.

See DAMAGES, 5.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

PURCHASER.

See TAXATION, TAX SALES AND TAX TITLES.

Barker v. *Jackson*, 621.

QUASHING JURY BOX.

SEE CRIMINAL LAW AND PROCEDURE, 61, 62, 63, 64, 65, 66, 67.

Cook v. *State*, 137.

RAILROADS.

1. APPLIANCES. *Death of employe. Machinery.*

Where the machinery of a railroad company was of a kind in general use, approved by the experience of many roads, and neither defective nor unsafe, the company is not liable for a death resulting from its use, notwithstanding a promise to substitute therefor other and safer machinery which might have prevented the fatal accident. *Jones* v. *Yazoo, etc., R. R. Co.*, 547.

2. CONSTITUTIONAL LAW. *Obligation of contract. Charter. Constitution of U. S., article* 1, *sec.* 10. *Constitution* 1890, *sec.* 16.

Where chartering a railroad corporation by direct legislative act the state granted it the right to fix, within maximum and minimum limits, the rates to be charged by it for carrying persons and property, the grant is inviolate, under Constitution of the United States, article 1, sec. 10, prohibiting the impairment of the obligation of contracts. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

3. SAME. *Laws* 1898, *p.* 66. *United States Constitution, Fourteenth Amendment. Constitution* 1890, *sec.* 112. *Due process of law. Corporate franchises. Taxation. Double taxation.*

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Railroads.

RAILROADS—*Continued.*

maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing the obligation of contracts shall not be passed, since it impairs the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(*c*) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

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4. DEMURRAGE. *Delayage. Powers. Railroad commission.*

Under Code 1892, § 4291, giving the railroad commission power to fix charges and supervise persons owning or operating express, telegraph, telephone or sleeping car companies, and Laws 1898, p. 97, ch. 82, extending all laws authorizing the commission to supervise common carriers to car service associations:—

(*a*) The railroad commission had power to make rules as to reciprocal demurrage; and

(*b*) The rule of the commission is valid which provides that when cars are properly loaded and shipper's instructions given, the railroad company must immediately issue bills of lading to the shipper, making the company liable to a penalty of one dollar

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Railroads.

RAILROADS—*Continued.*

per day in the owner's favor for delay in starting the shipment, after twenty-four hours following the issuance of the bill of lading. *Yazoo, etc., R. R. Co.* v. *Keystone, etc., Co.*, 391.

5. DEED TO RIGHT OF WAY. *Release of damages. Construction. Surface water. Change of grade.*

A deed conveying to a railroad company for a right of way land in a street upon which it had already constructed and was operating tracks, reciting that the grantors "released the company from any and all damages, whether past, present or future, for the construction and operation of the tracks," does not release the company from damages resulting from a flow of surface water caused by the railroad company elevating the grade of the street and of its tracks. *Yazoo, etc., R. R. Co.* v. *Smith*, 44.

6. EMINENT DOMAIN. *Railroad construction. Damages.*

In estimating damages to result from the construction of a railroad through a farm, it is improper to consider as an element of damage, either:—

(*a*) That laborers on the farm would likely stop work and look at passing trains; or

(*b*) That the mules in use on the farm would likely run away as trains approached; or

(*c*) That deleterious grasses might be scattered over the land; or

(*d*) That live stock getting upon the track would likely be killed by the trains. *Yazoo, etc., R. R. Co.* v. *Jennings*, 93.

7. SAME. *Excessive award. Case.*

Facts of the case considered and verdict adjudged excessive. *Ib.*

8. PASSENGERS. *Liability for act of employes. Conductor's right. Self-defense.*

A conductor of a passenger train has a right to defend himself from an attack by a passenger, but he has no right to strike a passenger with a pistol for the use of abusive language to him. *Coleman* v. *Yazoo, etc., R. R. Co.*, 629.

9. SAME. *Bystanders. Injuries.*

If a railroad conductor strike a passenger with a loaded pistol, not in self-defense, but because of the passenger's abusive language, and the weapon be discharged by the blow, the company will be liable for damages resulting from the shot to an innocent bystander, although the shooting be at a station and the bystander not a passenger. *Ib.*

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Railroads.

RAILROADS—*Continued.*

10. PASSENGERS. *Tickets. Ejection. Description of purchaser. Punch marks.*

A railroad passenger is not required to verify the punch marks placed on his ticket by the selling agent, and where the ticket described the passenger otherwise accurately, even noting the fact of his having a mustache, the conductor is not authorized to eject him because the selling agent by mistake punched the ticket for a female instead of a male. *Illinois, etc., R. R. Co.* v. *Gortikov*, 787.

11. SAME. *Return limit.*

Where by its terms a railroad ticket is good for a return trip until a given date, its limit is not shortened by punch marks in its margin, placed there mistakenly by the selling agent. *Ib.*

12. SAME. *Ejection. Punitive damages.*

The original purchaser of a return railroad ticket, if ejected by the conductor because the selling agent had erroneously punched his ticket for a female instead of a male, can recover both actual and punitive damages where the conductor, saying "this is a bogus ticket," ejected him without giving him an opportunity to explain. *Ib.*

13. SAME. *Contracts. Cautionary provisions. Unreasonable contracts void.*

A provision on a railroad ticket, printed under the head "Caution," to the effect that in cases of doubt between the passenger and conductor the passenger should pay the sum demanded by the conductor, take his receipt and report the same to the general office of the company, where the same would "receive prompt attention," is mere advice and not a contractual part of the ticket; but, if regarded as a part of the contract, it is unreasonable and void. *Ib.*

14. SLANDER. *Liability. Agents.*

A corporation is liable for slander uttered by its agent acting within the scope of his employment and in the performance of his duties touching the matter in question. *Rivers* v. *Yazoo, etc., R. R. Co.*, 196.

15. SAME. *Knowledge. Approval. Ratification.*

In such case it is unnecessary for a plaintiff to show that the slanderous words were spoken with defendant's knowledge or with its approval or that it ratified the act of the agent. *Ib.*

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RAILROAD COMMISSION.

See RAILROADS, 4.

Yazoo, etc., R. R. Co. v. *Keystone, etc., Co.*, 391.

RATIFICATION.

See SLANDER.

Rivers v. *Yazoo, etc., R. R. Co.*, 196.

REASONABLE TIME.

CONTRACTS. *Performance.*

An agreement to perform an act which fails to specify the time of performance will be treated as providing for performance within a reasonable time. *Burroughs* v. *Gilliland*, 127.

RECEIPTS.

See ADVANCEMENTS, 1.

Norfleet v. *Callicott*, 221.

RECEIVERS.

CORPORATIONS. *Insolvency. Stockholders' liability. Illegal dividends. Suits.*

A receiver of an insolvent corporation, when authorized by the court in which the receivership is pending, may sue at law and recover from stockholders dividends paid them by the corporation when insolvent. *Kretschmar* v. *Stone*, 375.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW AND PROCEDURE, 70.

Wells v. *State*, 516.

REMEDIAL STATUTES.

VESTED RIGHT

A litigant has no vested right in a rule of procedure or a remedial statute. *Hall, etc., Co.* v. *Foote*, 422.

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REPLEVIN.

1. JURISDICTION. *Amount in controversy. Value of property.*

In replevin, the value of the property seized, and not the amount of the debt for which the seizure is made, determines the amount in controversy as regards jurisdiction. *Brumfield* v. *Hoover*, 502.

2. SAME. *Parties. Sales. Reservation of title.*

One who sells to his partner, with a reservation of title until payment, his undivided interest in partnership property previously sold by the firm with a like reservation of title, may, on default of the firm's vendee, whose purchase money notes are held by him as collateral security, maintain replevin for the property without making his partner a party. *Ib.*

ROAD TAXES.

See MUNICIPALITIES, 6.

Lincoln County v. *Brookhaven*, 5.

RULES, RAILROAD COMMISSION.

Yazoo, etc., R. R. Co. v. *Keystone, etc., Co.*, 391.

SALES.

1. CONDITIONAL. *Resale by buyer. Remedy.*

Where a seller reserved title to personal property sold by him to secure the purchase price, he may assert such title to enforce payment against the buyer and those claiming under him, in the absence of evidence that he knew the buyer was a dealer in such articles and bought to resell. *Fairbanks* v. *Graves*, 53.

2. SAME. *Reservation of title. Waiver. Mortgage.*

The retention by the seller of title to personal property conditionally sold to secure the purchase money is not waived by his contemporaneously taking a mortgage from the buyer upon the same and other property to secure the debt. *Champenois* v. *Tinsley*, 38.

3. SAME. *Implied waivers.*

The doctrine of implied waiver can be invoked to defeat implied liens, not express ones. *Ib.*

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SALES—*Continued.*

4. PARTIES. *Sales. Reservation of title.*

One who sells to his partner, with a reservation of title until payment, his undivided interest in partnership property previously sold by the firm with a like reservation of title, may, on default of the firm's vendee, whose purchase money notes are held by him as collateral security, maintain replevin for the property without making his partner a party. *Brumfield* v. *Hoover*, 502.

5. STATUTE OF FRAUDS. *Code* 1892, § 4229. *Goods. Delivery.*

A verbal sale, involving no cash payment or understanding as to terms of payment, of a flock of sheep ranging in the woods, for four hundred dollars, is not saved from the statute of frauds, Code 1892, § 4229, by the delivery of three pet lambs not of the flock. *Ladnier* v. *Ladnier*, 475.

6. TRUSTEES. *Deed of trust. Inadequacy of price.*

A sale of land made by a trustee in a deed of trust, otherwise valid, will not be set aside for mere inadequacy of price, unless it be so great as to shock the conscience. *Weyburn* v. *Watkins*, 728.

7. SAME. *Notices of sale. Defects. Date.*

Notices of a trustee's sale, complying with the terms of the trust deed and the law, which clearly and properly give the time, terms and place of sale, are not invalidated by an erroneous date written under them. *Ib.*

8. SAME. *Principal and surety.*

The right to sell existing, a surety cannot complain of a trustee's sale of lands any more than a principal debtor. *Ib.*

SATISFACTION OF MORTGAGES.

See MORTGAGES, 6, 7.

Pierce v. *Kingston Lumber Co.*, 216.

Brown v. *Brown*, 410.

SECURED CREDITOR.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Kretschmar v. *Bank*, 363.

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SEWERAGE.

See MUNICIPALITIES, 3, 4, 5.

Vicksburg v. *Richardson*, 1.

Fewell v. *Meridian*, 380.

SIDEWALKS.

See MUNICIPALITIES, 7.

Natchez v. *Lewis*, 310.

SLANDER.

See CORPORATIONS, 4, 5.

Rivers v. *Yazoo, etc., R. R. Co.*, 196.

SLAVES.

See MARRIAGE.

Haines v. *Haines*, 100.

SOLICITOR'S FEE.

See PARTITION, 3.

Bowles v. *Wood*, 742.

SPECIAL JUDGES.

SUPREME COURT. *Argument before special judge. Decision after his retirement.*

The losing party cannot claim that he was wronged because his case, argued in the absence of the chief justice before the other two judges of the supreme court and a special judge, was decided after the return of the chief justice to and the retirement of the special judge from the bench, although the chief justice delivered the opinion in the case and the two regular judges who heard the argument merely concurred. *Bowles* v. *Wood*, 742.

SPECIAL TERM OF COURT.

JURISDICTION. *Circuit court. Order. Entry on minutes. Code* 1906, § 988.

The failure of the clerk to enter on the minutes of a circuit court an order for a special term thereof, which was duly made and

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SPECIAL TERM OF COURT—*Continued.*

published, does not affect the validity of proceedings had at such term, though Code 1906, § 988, provides that such order shall be entered on the minutes as well as be made and published. *Ex parte Neil*, 518.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF, 1, 2.

Meyer-Bridges Co. v. *Badeau*, 27.

Ladnier v. *Ladnier*, 475.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS, 1, 2, 3, 4, 5, 6, 7, 8, 9.

Stewart v. *Forman*, 85; *Eastland* v. *Yazoo, etc., Co.*, 330; *Kennedy* v. *Sanders*, 524; *Barker* v. *Jackson*, 621; *Gordon* v. *Anderson*, 677.

STOCK DUES.

See BUILDING AND LOAN ASSOCIATIONS.

Bank v. *Armor*, 709.

STOCKHOLDERS.

See CORPORATIONS, 1.

Kretschmar v. *Stone*, 375.

SUB-CONTRACTOR.

See BONDS.

Coker v. Bevard, 64.

SUBROGATION.

1. EQUITY JURISPRUDENCE. *Mortgages. Satisfaction.*

A party to a void marriage who, honestly believing that he is the husband of the other party thereto, on her verbal promise to convey him a half interest in the property, satisfies a mortgage on her land, is a mere volunteer and not entitled to be subrogated to the rights of the mortgagee. *Brown* v. *Brown*, 410.

2. TRUSTS AND COMBINES. *Insurance. Laws* 1900, *p.* 125.

The subrogation of an insurance company to the right of action of the insured against a wrongdoer through whose tort the

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SUBROGATION—*Continued.*

property was destroyed by fire has no relation to the business of an unlawful combination of which the company is a member, and is unaffected by Laws 1900, p. 125, avoiding all contracts made by members of such a combination for any purpose relative to the business thereof. *Freed* v. *American, etc., Co.*, 72.

SUITS.

See CORPORATIONS, 1.
Kretschmar v. *Stone*, 375.

SUNDAY.

1. DESECRATION. *Fruit stand. Code* 1906, § 1367. *Merchant.*

The keeper of a fruit stand is a "merchant, shopkeeper or other person" within the meaning of Code 1906, § 1367, prohibiting the keeping open of stores on Sunday for the purpose of disposing of any wares, merchandise, goods or chattels. *Gulfport* v. *Stratakos*, 489.

2. SAME. *Necessity. Charity. Merchandise.*

The sale of fruit is not a work of necessity or charity; and fruit is merchandise within the meaning of the Sunday law. *Ib.*

SUPREME COURT PRACTICE.

1. APPELLATE JURISDICTION ONLY. *Pretermitted matters.*

The supreme court, having only appellate jurisdiction, will not decide what was expressly pretermitted in the court of original jurisdiction. *Peirce* v. *Halsell*, 171.

2. CONSTITUTIONAL LAW. *Courts. Original and appellate jurisdiction. New trials. Excessive verdicts. Remittiturs. Code* 1906, § 4910.

Code 1906, § 4910, purporting to deprive the circuit courts of power to grant defendants new trials for excessive verdicts and to authorize the supreme court alone to require remittiturs, is unconstitutional:—

(*a*) It denies a defendant the right to have a complete disposition of his case in a forum provided by the organic law for the administration of justice to all; and

(*b*) It undertakes to confer original jurisdiction on the supreme court to which under the constitution appellate jurisdiction alone belongs. *Yazoo, etc., R. R. Co.* v. *Wallace*, 609.

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SUPREME COURT PRACTICE—*Continued.*

3. SPECIAL JUDGE. *Argument before. Decision after his retirement.*
The losing party cannot claim that he was wronged because his case, argued in the absence of the chief justice before the other two judges of the supreme court and a special judge, was decided after the return of the chief justice to and the retirement of the special judge from the bench, although the chief justice delivered the opinion in the case and the two regular judges who heard the argument merely concurred. *Bowles* v. *Wood*, 742.

4. WAIVER. *Indictment. Demurrer.*
On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the court below. *Sherrod* v. *State*, 856.

SURETY COMPANY.

See PRIVILEGE TAXES, 1.
Cole v. *American, etc., Co.*, 782.

SURFACE WATER.

See RAILROADS, 5.
Yazoo, etc., R. R. Co. v. *Smith*, 44.

TAXATION, TAX-SALES AND TAX-TITLES.

1. ABATEMENT ACT. *Sales. Time. Laws* 1875, *p.* 49.
A sale made on May 10, 1875, for the taxes of the year 1874 cannot be a sale under the Abatement Act (Laws 1875, p. 49) and is void, the law requiring sales for the taxes of the year 1874 to be made in February, 1875. *Kennedy* v. *Sanders*, 524.

2. SAME. *Appeals. Theory of defense. Inconsistency.*
When defendants in a suit to quiet title claimed on the trial under a tax sale made on May 10, 1875, for the taxes of 1874, they can not on appeal claim title under the Abatement Act. *Ib.*

3. SAME. *Land sales, etc. Evidence.*
A tax sale to the state under the Abatement Act can not be maintained without independent evidence that by reason of its delinquency for taxes of years prior to 1874 the land belonged to the class contemplated by the act, the mere production of the

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Taxation.

TAXATION—*Continued.*

sales list to the state and the state's deed to the claimant being insufficient. *Kennedy* v. *Sanders*, 524.

4. ABATEMENT ACT. *Delinquency. Assessment roll.*

An assessment of land to the state shown by a roll filed August 5, 1875, is imputable to a sale to the state that occurred on May 5, 1875, and not to a sale in 1874 for the taxes of 1873, or to some earlier sale. *Ib.*

5. SAME. *Possession. Assessment.*

The assessment of lands to defendants does not prove that they paid the taxes thereon, and is valueless as evidence of adverse possession. *Ib.*

6. CONFIRMATION. *Bill. Parties. Code* 1892, § 498 (*Code* 1906, § 548).

A bill to confirm a tax-title under Code 1892, § 498, providing that all persons interested be made defendants is demurrable for want of proper parties where one named in the tax-deed exhibited with the bill as the person assessed with the taxes for which the land was sold, is not made a defendant, nor any reason given for such omission, although the bill is verified by oath and alleges "that the defendants named are the only ones, so far as complainant can ascertain after diligent inquiry." *Smith* v. *Denny Co.*, 434.

7. SAME. *Leave to amend. Dismissal.*

When a demurrer to a bill has been sustained for want of proper parties, it is not error to dismiss the bill on complainant's declining to avail of leave to amend by joining as a defendant the party improperly omitted. *Ib.*

8. SAME. *Pleadings. Averments as to title. Collector's deed. Effect of same. Code* 1892, § 1806 (*Code* 1906, § 1983).

A bill to confirm a tax-title which avers that complainant acquired title through his purchase at a tax-collector's sale, evidenced by the collector's deed exhibited with the bill, sufficiently sets out complainant's title, since under Code 1892, § 1806 (Code 1906, § 1983) the collector's deed to an individual is *prima facie* evidence that the assessment and sale of the land were legal and valid. *Ib.*

9. CONSTITUTIONAL LAW. *Obligation of contract. Railroad charter. Constitution of U. S., article* 1, *sec.* 10. *Constitution* 1890, *sec.* 16.

Where chartering a railroad corporation by direct legislative act

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Taxation.

TAXATION—*Continued.*

the state granted it the right to fix, within maximum and minimum limits, the rates to be charged by it for carrying persons and property, the grant is inviolate, under Constitution of the United States, article 1, sec. 10, prohibiting the impairment of the obligation of contracts. *Gulf, etc., R. R. Co.* v. *Adams*, 559.

10. CONSTITUTIONAL LAW. *Laws* 1898, *p.* 66. *United States Constitution, Fourteenth Amendment. Constitution* 1890, *sec.* 112. *Due process of law. Corporate franchises. Taxation. Double taxation.*

Laws 1898, p. 23, sec. 66, purporting to impose on each railroad company claiming an exemption from state supervision, under maximum and minimum provisions of its charter as to rates, an additional privilege tax is unconstitutional and void:—

(*a*) Its enforcement would be a taking of property without due process of law, contrary to the fourteenth amendment to the constitution of the United States, since the tax is one over and beyond the usual tax required to be paid by other railroads doing similar business and the exaction is solely because of the enjoyment by the railroad company of its contract right;

(*b*) It violates article 1, sec. 10, United States Constitution, prohibiting a state to pass any law impairing the obligation of contracts, and Constitution 1890, sec. 16, providing that laws impairing the obligation of contracts shall not be passed, since it impairs the charter contract and the tax is imposed solely because of the enjoyment by the railroad company of its contract right;

(*c*) Considered as an *ad valorem* tax it is discriminatory and violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since it provides for a classification of railroads and the imposition of a privilege tax according thereto and lays the additional tax solely with reference to the existence of the exemption, irrespective of value; and

(*d*) Considered as an *ad valorem* tax on the value of the exemption as property the additional privilege tax is violative of Constitution 1890, sec. 112, providing that taxation shall be equal and uniform, since the revenue laws provide that there shall be an assessment of railroad property for *ad valorem* taxes by the railroad commission, values to be fixed with reference to the earning capacity of the companies and their franchises, and it must be presumed that the commission has considered the exemption as an element of property value. *Ib.*

11. EXCESS OF BID. *Tax-collector's liability. Official bond. Interest on excess. Code* 1892, §§ 3820, 3824.

Under Code 1892, §§ 3820, 3824, regulating the subject, the liability

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Taxation.

TAXATION—*Continued.*

of a tax-collector, receiving from a tax sale purchaser a sum in excess of the taxes and costs for which the sale was made and retaining the same, to repay the excess arises when redemption from the tax sale is effected, and a failure to then pay over is a breach of his official bond; but he is not liable for interest on the excess before the redemption. *Bank* v. *Dodds*, 767.

12. LIMITATIONS. *Inapplicability. Code* 1871, § 1709; *Code* 1880, § 539.

A tax-collector being without power to sell under the Abatement Act land not delinquent for taxes that accrued prior to the year 1874, his sale of such land is void, and none of the statutes of limitations designed specially to protect tax titles are applicable to a claim under such sale. *Kennedy* v. *Sanders*, 524.

13. SAME. *Title. Removal of clouds. Code* 1892, § 2731.

A proceeding in equity by the holder of a valid paper title to land to remove a cloud thereon asserted by one not in possession is not barred by his failure to sue within the period he might have made an entry or sued at law to recover the land under Code 1892, § 2731, providing that suits in equity to recover land may not be brought but within the period during which by virtue of § 2730 of said code he might have made an entry or brought an action to recover the land, if he had been entitled at law. *Ib.*

14. SAME. *Tax sale. Unconstitutional law. Code* 1880, § 539; *Code* 1892, § 2735. *Code* 1906, § 3095. *Statute of limitations.*

A tax sale based upon a pretended assessment, made under a statute violative of the constitution, is not aided by the three-years statute of limitations, Code 1880, § 539; Code 1892, § 2735; Code 1906, § 3095. *Eastland* v. *Yazoo, etc., Co.*, 330.

15. SALES. *Method. Evidence. Testimony of officer. Official acts. Code* 1892, § 3813.

Under Code 1892, § 3813, requiring country lands sold for taxes to be offered in forty acre tracts:—

(*a*) A sale of an undivided one-half interest in an eighty acre tract is illegal, and

(*b*) It is competent to prove how the sale was conducted by the tax collector who made it. *Stevenson* v. *Reed*, 341.

16. SAME. *Purchaser. Chancery clerk. Validity.*

The purchase of land at tax sale by a chancery clerk is void, since the performance of official duties for which he is compensated involves acts relating to such sales. *Barber* v. *Jackson*, 621.

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TAXATION—*Continued.*

17. SALES. *Statute of limitations. Code* 1880, § 539; *Code* 1892, § 2735.

The three-years statutes of limitation has no application to an illegal purchase of lands by the chancery clerk at a tax sale. *Barber* v. *Jackson*, 621.

TAX COLLECTOR.

See TAXATION, TAX-SALES AND TAX-TITLES, 11, 15.

Bank v. *Dodds*, 767.

Stevenson v. *Reed*, 341.

TELEPHONE LINE.

See EMINENT DOMAIN, 2.

Cumberland, etc., Co. v. *Railroads*, 686.

TENANCY IN COMMON.

RIGHTS OF COTENANTS. *Purchase of outstanding title. Wife of Cotenant. Husband and wife. Lands.*

Where the land of cotenants is subject to a superior lien granted by a former owner and is sold thereunder:—

(*a*) A purchase by one cotenant will inure to the benefit of all the tenants; and

(*b*) A purchase by the wife of one of the cotenants will likewise inure to the benefit of all of them, although married women have been wholly emancipated from common law disability on account of coverture. *Beaman* v. *Beaman*, 762.

TENDER.

See PARTITION, 2.

Peirce v. *Halsell*, 171.

FIRE INSURANCE, 1, 2.

Ætna, etc., Co. v. *Mount*, 642.

TICKETS.

See RAILROADS, 10.

Illinois, etc., R. R. Co. v. *Gortikov*, 787.

TIMBER-DEEDS.

See DEEDS, 3.

Clark v. *Ingram-Day, etc., Co.*, 479.

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TRUST AND COMBINES.

1. CONTRACTS. *Laws* 1900, *ch.* 88, *p.* 125.

A contract between two cotton seed oil manufacturers is invalid, where it purports to bind one of them, in consideration of the withdrawal by the other of an agent for the purchase of cotton seed from designated territory, to protect the other from liability to the withdrawn agent and furnish an agreed quantity of seed during the season at a named price, under Laws 1900, ch. 88, p. 125, defining a trust or combine to be, among other things, a combination to hinder competition in the purchase of a commodity, and making illegal every contract relative to the business of a trust or combine. *Kosciusko, etc., Co.* v. *Wilson, etc., Co.*, 551.

2. INSURANCE. *Subrogation. Laws* 1900, *p.* 125.

The subrogation of an insurance company to the right of action of the insured against a wrongdoer through whose tort the property was destroyed by fire has no relation to the business of an unlawful combination of which the company is a member, and is unaffected by Laws 1900, p. 125, avoiding all contracts made by members of such a combination for any purpose relative to the business thereof. *Freed* v. *American, etc., Co.*, 72.

TRUSTEE.

PARTIES. *Substitution. Amendment. Legal title. Practice.*

Where the beneficiary in a deed of trust erroneously brought an action of replevin in his own name for the property conveyed, an amendment making the trustee plaintiff in the suit, seasonably asked, should have been allowed in the circuit court, although the case originated in a justice of the peace court. *McCue* v. *Massey*, 124.

TRUSTEE'S SALE.

1. DEED OF TRUST. *Inadequacy of price.*

A sale of land made by a trustee in a deed of trust, otherwise valid, will not be set aside for mere inadequacy of price, unless it be so great as to shock the conscience. *Weyburn* v. *Watkins*, 728.

2. SAME. *Notices of sale. Defects. Date.*

Notices of a trustee's sale, complying with the terms of the trust deed and the law, which clearly and properly give the time,

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TRUSTEE'S SALE—*Continued.*

terms and place of sale, are not invalidated by an erroneous date written under them. *Weyburn* v. *Watkins*, 728.

3. DEED OF TRUST. *Principal and surety.*

The right to sell existing, a surety cannot complain of a trustee's sale of lands any more than a principal debtor. *Ib.*

TRUSTS.

WILLS. *Interest given. Precatory words.*

A will devising to the wife of the testator all of his property, the proceeds to be appropriated to the payment of his debts and the support of herself and his children, invests a perfect title in the wife after the youngest child reaches majority, the precatory words not creating a trust, although the devise was followed by a request that the real estate should not be sold or mortgaged during the minority of any one of the children, coupled with a recital that after such time she should be at liberty to make whatever disposition of the property she might deem proper for the use and benefit of the children. *Courtenay* v. *Courtenay*, 181.

UNCONSCIONABLE ADVANTAGE.

See INJUNCTION, 1.

Wall v. *Harris*, 671.

UNDUE INFLUENCE.

See DEEDS, 4.

Leach v. *Hirshman*, 723.

UNILATERAL AGREEMENT.

See BROKERS, 1, 2.

Taylor v. *Barbour*, 888.

UNITED STATES MAIL.

See BOND.

Coker v. *Bevard*, 64.

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USURY.

See BUILDING AND LOAN ASSOCIATIONS.
Bank v. *Armor*, 709.

VALUE.

1. DAMAGES. *Measure. Loss of property. No market value. Hotel-keeper. Guest.*

Where a guest's personal property, having no market value, was lost by the negligence of a hotel-keeper, in whose custody it had been placed, his liability is more than nominal; a recovery may be had for the monetary value of the property to the guest. *Austin* v. *Millspaugh*, 354.

2. EMBEZZLEMENT. *Money. Amount. Value.*

An indictment for embezzling an amount of money need not charge the value of the money; the words "amount" and "value," when applied to money, are synonymous. *Richburger* v. *State*, 806.

3. REPLEVIN. *Jurisdiction. Amount in controversy. Value of property.*

In replevin, the value of the property seized, and not the amount of the debt for which the seizure is made, determines the amount in controversy as regards jurisdiction. *Brumfield* v. *Hoover*, 502.

VENUE.

See CRIMINAL LAW AND PROCEDURE, 43.
Richburger v. *State*, 806.

VARIANCE.

See CRIMINAL LAW AND PROCEDURE, 29.
Richburger v. *State*, 806.

VENDOR AND VENDEE.

1. DEED. *Lien. Recited consideration. Actual consideration.*

A grantor who conveys land on the promise of a representative of the grantee to pay an agreed consideration can enforce his lien thereon for the agreed price though his deed recites a less price. *Matthews* v. *Delta, etc., R. R. Co.*, 429.

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Vendor and vendee—Waiver.

VENDOR AND VENDEE—*Continued.*

2. PURCHASE MONEY. *Lien. Erection of plant. Payment out of gross receipts.*

The lien of a vendor of land for a fixed part of the unpaid purchase money is not affected by a provision in the deed that payment is to be made out of the gross receipts of a manufactory to be erected on the land by the vendee, which was never in fact erected. *Burroughs* v. *Gilliland*, 127.

3. SAME. *Equity practice. Conflict between bill and exhibits.*

A conflict between some of the allegations of a bill of complaint and the exhibits thereto is not fatal on demurrer if the other allegations and exhibits present a good case. *Ib.*

VERDICT, EXCESSIVE.

See CONSTITUTIONAL LAW, 3.

Yazoo, etc., R. R. Co. v. *Wallace*, 609.

VESTED RIGHT.

REMEDIAL STATUTE. *Rule of procedure.*

A litigant has no vested right in a rule of procedure or a remedial statute. *Hall, etc., Co.* v. *Foote*, 422.

WAIVER.

1. DEMURRER. *Supreme court.*

On appeal to the supreme court a demurrer to an indictment will be treated as waived or withdrawn, in the absence of all record evidence of its having been otherwise disposed of in the trial court. *Sherrod* v. *State*, 856.

2. INSURANCE. *Failure to return unearned premium.*

An insurer, in a policy containing the usual iron safe clause and stipulating that if the policy should become void the unearned portion of the premium should be returned, does not waive a breach of the iron safe clause by failing, after knowledge of the loss, to return or offer to return the unearned portion of the premium; no demand having been made, nor any offer to surrender the policy. *Ætna, etc., Co.* v. *Mount*, 642.

3. SAME. *Estoppel.*

An insurance company or benefit society can not exempt itself in advance, either by contract or by-laws, from an estoppel to assert

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WAIVER—*Continued.*

a forfeiture of a policy where there has been a breach of conditions on the part of the insured and the society's conduct has been such as to affirmatively induce the belief that the forfeiture was waived. *Morgan* v. *Jacob's Children*, 864.

4. SALES. *Conditional sale. Reservation of title. Mortgage.*

The retention by the seller of title to personal property conditionally sold to secure the purchase money is not waived by his contemporaneously taking a mortgage from the buyer upon the same and other property to secure the debt. *Champenois* v. *Tinsley*, 38.

5. SAME. *Implied waivers.*

The doctrine of implied waiver can be invoked to defeat implied liens, not express ones. *Ib.*

WIDOW.

See HOMESTEAD.

Warren v. *Davis*, 336.

See WILLS, 2, 5, 6.

Callicott v. *Norfleet*, 221.

WILLS.

1. DEEDS. *Construction. Will or deed.*

A writing, not attested as a will, but acknowledged as a deed, conveying a life estate, followed by the words "I will" a second life estate to a daughter, and providing that after the death of the daughter the property "goes to her children and their heirs and assigns forever," is not a will but a deed to the second life estate as well as to the first one. *Brinson* v. *Sandifer*, 41.

2. RENUNCIATION BY WIDOW. *Code* 1892, § 4496. *Rights of devisees.*

Where a testator devised his homestead to his widow and directed that a sum of money should be invested, the income therefrom to be paid her during her life or widowhood and at her death or marriage the money divided between her three children by the testator, and the widow renounced the will, as authorized by Code 1892, § 4496, the homestead became a part of the general estate but the money went to the three children named. *Norfleet* v. *Callicott*, 221.

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Wills.

WILLS—*Continued.*

3. RENUNCIATION BY WIDOW. *Rights of devisees.—Ademption of legacy.*

A devise of money is adeemed if after the writing of the will the legatee receive from the testator the sum of money named, executing a receipt in full for her interest in the estate, though the will remained unchanged. *Norfleet* v. *Callicott*, 221.

4. SAME. *Advancement. Receipts. Relinquishment of right in estate.*

Where a testator during his life made advancements to his adult children, taking receipts from them in full of their interest in his estate, the receipts are in the nature of contracts and extinguish the rights of the parties giving them, and of their heirs, in testator's estate. *Ib.*

5. SAME. *Widow's right. Renunciation of will.*

Where three of six children of a decedent received advancements from him and gave contractual receipts extinguishing all their right in his estate; his widow by renouncing his will, under Code 1892, § 4496, authorizing such renunciation, became entitled to one-fourth of the estate. *Ib.*

6. SAME. *Descent and distribution. Statutory construction. Code* 1892, §§ 1545, 4496.

Code 1892, §§ 1545, 4496, the one section regulating the descent of property between husband and wife and the other providing for the renunciation of a will by the widow of the testator, must be construed together, and the word "child" as used in the former means such child as shall have a right under the law to share in the estate of his intestate father, and does not include children who have contracted away the right. *Ib.*

7. TRUST. *Interest given. Precatory words.*

A will devising to the wife of the testator all of his property, the proceeds to be appropriated to the payment of his debts and the support of herself and his children, invests a perfect title in the wife after the youngest child reaches majority, the precatory words not creating a trust, although the devise was followed by a request that the real estate should not be sold or mortgaged during the minority of any one of the children, coupled with a recital that after such time she should be at liberty to make whatever disposition of the property she might deem proper for the use and benefit of the children. *Courtenay* v. *Courtenay*, 181.

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WITNESSES.

1. CREDIBILITY. *Falsus in uno. Trial. Instructions.*

An instruction that, if witness has sworn falsely to any material matter, the jury may disregard his testimony, is erroneous for failure to state that the false swearing must have been wilful. *Bell* v. *State*, 104.

2. CRIMINAL LAW AND PROCEDURE. *Affidavit. Absent witness. Effect of admission. Instructions. Testimony of accused. Credibility. Cross-examination. Evidence. Comment on failure of accused to testify.*

Upon the second trial of an accused charged with homicide, the defendant being the only witness to the killing in his behalf, it was error:—

(*a*) To permit the state to show that the defendant's absent witness was present but not introduced by him at the former trial, the state having agreed that the witness if present would testify as shown in an affidavit read to the jury; and

(*b*) To allow the state to ask defendant when testifying in his own behalf, whether he had testified in his previous trial; and, without reference to whether the trial be a first or other one,

(*c*) To instruct the jury at the instance of the state that they should, in weighing the evidence, take into consideration defendant's interest in the result of the trial; and

(*d*) To allow the state to show on cross-examination of a witness that he claimed a reward for arresting the accused. *Smith* v. *State*, 111.

3. TAX COLLECTOR. *Official act. Competency.*

Under Code 1892, § 3813, requiring country lands sold for taxes to be offered in forty acre tracts:—

(*a*) A sale of an undivided one-half interest in an eighty acre tract is illegal, and

(*b*) It is competent to prove how the sale was conducted by the tax collector who made it. *Stevenson* v. *Reed*, 341.

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